Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

RICHARD HOPEWELL,

Petitioner,

v.

MIDCONTINENT BROADCASTING CORPORATION d/b/a KELOLAND NEWS, STEVE HEMMINGSEN, JESSICA ARMSTRONG, JOHN DOE A, JOHN DOE B, JOHN DOE D AND JOHN DOE E,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

PETITION FOR A WRIT OF CERTIORARI

RICHARD HOPEWELL
Petitioner *pro se*.
423 South Phillips Avenue
Sioux Falls, SD 57102
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QUESTIONS PRESENTED

I

DID LOWER COURT SUPPRESSION OF IDENTITIES OF TORTFEASOR RESPONDENTS JOHN DOE A, B, D AND E DEPRIVE PETITIONER OF HIS DUE PROCESS RIGHT TO LITIGATE HIS ACTION AT BAR AGAINST RESPONDENTS JOHN DOE A, B, D AND E?

Argument at page 17.

II

WITHOUT HAVING THERETOFORE CONDUCTED AN EVIDENTIARY HEARING ON THE MATERIAL FACTS HEREIN, DOES TRIAL COURT'S *EX PARTE* FINDING THAT "THE RECORD FAILS TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT (RESPONDENTS) ACTED WITH ACTUAL MALICE" DEPRIVE PETITIONER OF HIS DUE PROCESS RIGHT TO A HEARING ON COURT FINDING?

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PETITIONER'S LIFE AS RESPECTIVELY PROHIBITED BY THE FOURTEENTH AND FOURTH AMENDMENTS?

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V

DID RELEASE OF CONFIDENTIAL RECORDS IN VIOLATION OF CITY REGULATION AND STATE STATUTES DEPRIVE PETITIONER OF EQUAL PROTECTION OF SAID REGULATION AND STATUTES GUARANTEED BY FOURTEENTH AMENDMENT?

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VI

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VII

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VIII

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IX

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REPORTED LOWER COURT OPINIONS

There are no official or unofficial reports of the South Dakota trial court's January 7, 1994 order (Appendix A) granting summary judgment which Petitioner on March 28, 1994 appealed to the South Dakota Supreme Court; the October 18, 1995 decision (Appendix B) of which court is reported at 538 NW2d (S.D. 1995).

JURISDICTION

The decision (Appendix B) herein by Petitioner sought to be reviewed by this Court was made and entered by the Supreme Court of South Dakota is by the Petitioner invoked pursuant to 28 USC 1257 (a).

CONSTITUTIONAL PROVISIONS

Section 1 of Article VII of the South Dakota Constitution provides:

> "Elections shall be free and equal, and no power, civil or military, shall at any time interfer to prevent the free exercise of the right of suffrage."

The "freedom of association" clause of the First Amendment to the United States Constitution provides:

> "Congress shall make no law . . . abridging . . . the right of the people to peaceably assemble . . . ."

The Fourth Amendment of the United States Constitution in material part provides:

> "The right of the people to be secure in their persons . . . papers and effects, against unreasonable searches and seizures, shall not be violated."

Section 1 of the Fourteenth Amendment to the United States Constitution in material part provides:

> ". . . [N]or shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATE STATUTES AND CITY REGULATIONS RE-

QUIRING DESTRUCTION OF SFPD CASE REPORT
(300) AND PROHIBITING PUBLICATION THEREOF
& OF BAR INVESTIGATION OF PETITIONER

SDCL 23-5-1 in material part provides:

"The attorney general shall procure and file for record . . . **infromation as may be pertinent of all persons who may hereafter be taken into custody for offenses** . . . ." (Emphasis added.)

SDCL 1-27-1 provides:

"In every case where the keeping of a record, or the preservation of a document or other instrument is required of an officer or public servant under any statute of this state, such record, document, or other instrument shall be kept available and open to inspection by any person during the business hours of the office or place where the same is kept."

SDCL 1-27-3 provides:

"Section 1-27-1 shall not apply to such records as are specifically enjoined to be held confidential or secret by the laws requiring them to be so kept."

SDCL 23-5-11 provides:

"Section 1-27-1 does not apply to confidential criminal justice information."

SFPD* Records Control Regulation 1201 in part provides:

". . . Records destruction shall comply with those guidelines set forth in 'Managing Public Records' prescribed by the State of South Dakota Bureau
of Administration Records Management Program."

Adopted pursuant to the foregoing regulation, SFPD* Case Report Retention and Destruction Regulation 213 in part provides:

"CASE REPORT . . . is used to provide background information and a narrative completed by the officer outlining circumstances of the initial contact and disposition of a case . . . . Retain 2 years in office, then transfer

* Sioux Falls Police Department.

to storage for eight years. Destroy after 10 years provided the file has remained inactive without leads, for 1 year prior to disposal."

SFPD Records Information Security Regulation 1202 in part provides:

"Federal and state law closely regulates the collection and dissemination of Criminal Records information. **Any criminal record information contained in the department's record system can only be shared with other law enforcement agencies and officers, and others in the criminal justice system, on a strict need and right to know basis** . . . . Only Police Department personnel will use the CRT terminals. **No information available on the CRT's will be given out to the general public** . . . ."

SDCL 16-16-99 in material part provides:

"All proceedings involving allegations of misconduct by . . . an attorney shall be kept confidential until a formal complaint asking for disciplinary action is filed with the Supreme Court by the board or the attorney general . . . ."

SOUTH DAKOTA RULES OF CIVIL PROCEDURE

SDCL 15-6-6(d) in material provides:

"A written motion . . . and notice hearing thereof . . . shall be served not later than five days before the time specified for the hearing . . . ."

SDCL 15-6-7(b)(1) in material part provides:

"An application to the court for an order shall be by motion which . . . shall be made in writing . . . ."

SDCL 15-6-8(d) in material part provides:

"Averments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleading."

SDCL 15-6-15(a) in material part provides:

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . ."

SDCL 15-6-16(3), in effect at all material times herein until repealed as of July 1, 1993, in material part provides:

> "In any action, the court may in its discretion direct the attorneys for the parties to appear before if for a conference to consider . . . (t)he possibility of obtaining admissions of fact . . . ."

SDCL 15-6-26(b)(1) which in part provides:

> ". . . Parties may obtain discovery regarding any, not privileged, which is relevant to the subject matter involved in the pending action . . . including the . . . identity and location of persons having knowledge of any discoverable matter."

SDCL 15-6-33 in material part provides:

> "(a) Any party may serve upon any other party written interrogatories to be answered by the party served . . . who shall furnish the information as is available to the party . . . .
>
> "(b) Interrogatories may relate to any matters which can be inquired into under § 15-6-26 (b), and the answers may be used to the extent permitted by the rules of evidence."

In reference to summary judgment proceedings herein sought by Respondents, SDCL 15-6-56(c) in material part provides:

> ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, in any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

SDCL 15-6-58 in material part provides:

> ". . . A judgment or an order becomes complete and effective when reduced to writing, signed by the court or judge, **attested by the clerk** and filed in his office." (Emphasis added.)

SDCL 15-6-77(a) provides;

> "Trial courts of record shall be deemed always open for the purpose of

filing any pleading or other proper paper, of issuing and returning mesne and final process, **and of making and directing all interlocutory motions, orders and rules**. (Emphasis added.)

SDCL 15-11-4 provides:

"When an action or proceeding is call for trial or hearing, or at any time previous thereto, the court or judge may, **upon good cause shown**, direct the trial or hearing to be postponed to another day of the same or next term, or to such time as shall be just in view of all the circumstances." (Emphasis added.)

SDCL 15-11-6 in material provides:

"All applications for continuance must be made, by motion . . . ."

SDCL 15-15-1 provides:

"When a court reporter is making a record of the proceedings of the court in any trial, motion, or proceeding of any kind before the court, he shall note all objections to the evidence and rulings thereon and all motions, stipulations, applications, and similar proceedings relevant to the matter involved and all rulings and remarks of the court thereon."

SDCL 15-15-2 provides:

"If there is no court reporter making such record, the clerk of the court shall keep full and accurate minutes of all such matters as referred to in § 15-15-1 and rulings thereon. In the absence of both reporter and clerk, the judge shall preserve the minutes of the proceedings. If the record of the court action is kept by an automated process, the computer record shall constitute the minutes of the court."

[Numbers in parentheses are pages in the state trial court record]

STATEMENT OF CASE

On May 28, 1978, Petitioner was detained by the City Of Sioux Falls Police Department (SFPD) for an official of record reason other than an arrest for a criminal offense. While the SFPD has no lawful authority to collect and retain in its official record any data on Petitioner other than criminal offenses for which Petitioner had been arrested, the SFPD kept a microfiche record of this noncriminal episode; a copy of which Sioux Falls Police Department Case

Report No. 44 is attached hereto as Appendix C. Said Report has been redacted to exclude herein inadmissible material having heretofore worked unjust prejudice of Petitioner's reputation and livelihood as a lawyer in herein continuing libel of Petitioner under color of judicial privilege.

To be observed in the upper left hand corner of SFPD Case Report No. 44 (Appendix C), said Report is on its face officially classified as a report of a noncriminal "Incident", *vis-à-vis* criminal "Offense" as otherwise therein provided for as on optional classification of the *res* of the Report, for which Petitioner had on May 28, 1978 been detained by the SFPD and which detainment, in lower right hand corner thereof, was not "Cleared by Arrest" for a criminal offense as therein in option provided for but rather, opposite the signature of the senior investigating police detective, "Exceptionally Cleared" by means other than an arrest for a criminal offenses by operation of a separate May 28, 1978 Emergency Order for Detention (290) signed by the Chairman of the Minnehaha County Board of Mental Illness upon May 28, 1978 Application for Emergency Treatment (287) signed by the police patrolman who had interviewed eyewitnesses to, and been otherwise responsible for the SFPD field investigation of, the May 28, 1978 incident at bar and issue herein.

In conspiracy with Respondents John Doe A, B and D*, all of whom are presumably legal and police officers in the employ of the City of Sioux Falls, to deny, solely for the reason that Petitioner was a member of good standing in the State Bar of South Dakota and a candidate thereby for South Dakota Second Judicial Circuit Court Judge in the forthcoming November 6, 1990 general election, in violation of Petitioner's Fourteenth Amendment right to equal protection of:

1. SDCL 23-5-1, *supra* at 2, which operates in prohibition of city police keeping of investigative records which have not resulted in arrest for criminal offenses;

* As lower state courts have upheld refusal of Respondent Armstrong to disclose the names of her anonymous co-conspiratorial joint tortfeasor Respondents John Doe A, B, D and E.; the only way by whichPetitioner can be herein relieved from this obstruction of his fundamental Fourteenth Amendment due process right to litigate his civil actions herein against Respondents John Doe A, B, D and E and the City of Sioux Falls is through this Court's order on remand to the lower courts that Respondent Armstrong be ordered to disclose the names of Respondents John Doe A, B, D and E.

2. SFPD Case Report Retention and Destruction Regulation 213, *supra* at 2., which required that the police case report (Appendix C) of the May 28, 1978 incident at issue be "(d)estroyed after 10 years";

3. SDCL 1-27-3 and 23-5-11, *supra* at 2, which prohibited release of "confidential" information from said case report to public; and

4. SFPD Records Information Security Regulation 1202, *supra* at 3, which prohibited release of information in the May 28, 1978 incident report to in an institution or individual other than "other law enforcement agencies and officers";

Respondent Jessica Armstrong, a commercial television news reporter, with the advance approval and cooperation of a legal or police officer in the employ of the City of Sioux Falls, presumably Respondent John Doe A, from her remote office computer on October 26, 1990 directly accessed the confidential investigative records computer bank of the Sioux Falls Police Department and, more than two years after the record (Appendix C) should theretofore been destroyed by the SFPD on May 28, 1988, retrieved therefrom on her computer screen a false and defamatory confidential government printout:

"... of the May 28, 1978 incident which was shown on the screen as a statutory rape. It was from that investigation that the police case report was then found on the microfiche and read to me over the telephone by Source A" (399);

Source A herein being Respondent John Doe A.

From the contents of the aforesaid May 28, 1978 incident report (300) read over the telephone by Respondent John Doe A to Respondent Armstrong, together with her pre-broadcast interviews of Respondents John Doe B (340), D (340) and E (341), it is without dispute herein (52-53) that during the 6:00 p.m. television broadcast of Respondent Midcontinent Broadcasting Corporation doing business as KeloLand News, hereinafer referred to as "KELO", Respondent Armstrong, a reporter employed by KELO, on October 26,1990 broadcast:

"... KeloLand news has learned Hopewell ended up being arrested that same day for attempted rape. . . . After being forced form the house sources say that Hopewell headed to St. Joseph's Cathedral where he allegedly greeted parishioners in the nude. Hopewell was later arrested for

attempted rape and the next day was taken to Yankton State Hospital on an emergency mental commitment so the case has been dismissed . . . . Sources also tell us Hopewell's conduct has been investigated by the Bar Association which is responsible for monitoring attorney's actions. But those investigations and the results of them are confidential."

At dispute herein is whether Respondent Armstrong also broadcast that Petitioner had been "charged" with attempted rape which Petitioner alleges (4) in his First Amended Complaint but which Respondent Armstrong denies (77).

It is without dispute herein (57-58) that during the 10:00 p.m. television news program of KELO on October 26, 1990, Respondent Steve Hemmingsen, a reporter employed by KELO, broadcast:

". . . Keloland News has learned there's more to that incident including an arrest for the alleged attempted rape of a woman acquaintance in her home. After being run out of the house according to our sources, Hopewell turned up still naked at St. Joseph's Cathedral. Our sources tell us the matter was dropped when Hopewell was taken to a mental hospital on an emergency commitment."

At the close of his foregoing news segment regarding Petitioner and as his editorialized lead into his next news story, Respondent Hemmingsen also broadcast (394-95) that where South Dakota had its Dick Hopewell, Minnesota had its governor candidate Jon Grunseth, who had theretofore allegedly enticed adolescent females into nude swimming with him, thereby imputing that Grunseth was a pedophile and that Petitioner's conduct equated to that of Grunseth's sexual behavior with children; which Respondent Hemmingsen disputes having so broadcast. (333)

In her October 27, 1992 Answers to Interrogatories, Respondent Armstrong identified her sources for her broadcasts that Petitioner:

". . . ended up being arrested that same day for attempted rape" were "Source A and Source D" (339);

"headed to Saint Joseph's Cathedral where he allegedly greeted parish(io)ners in the nude" were "Sources A, B and D" (98, 340);

". . . was . . . the next day . . . taken to Yankton State Hospital on an emergency mental commitment" was based. . . information provided me by Source A from the police report" (340); and

"Hopewell's conduct has been investigated by the Bar Association . . . but those investigations and the results of them are confidential" as "Source E" (341);

all of whom have herein respectively been joined as Respondents John Doe A, B, D and E by Order (330) of the trial court on Motion (272) by Petitioner.

As evidence that Petitioner had not, contrary to information provided by Respondents John Doe A and D to Respondents Armstrong and Hemmingsen for their public broadcast thereafter, been charged and arrested for a crime nor taken to the state mental hospital on an emergency mental commitment; herein adduced, without objection by Respondents, into the record of the trial court by offer of Petitioner are a Certificate (140) of the Minnehaha County Criminal Records Deputy Clerk of Court which provides that there is:

"no record of any charge in Minnehaha County against Richard Hopewell for the Month of May in the year of 1978";

and a June 10, 1993 Affidavit (139) of the South Dakota Human Services Records Director which provides:

"This is to certify that Richard James Hopewell has never appeared for an admission or been admitted to the South Dakota Human Services Center, formerly know as the Yankton State Hospital, located in Yankton, South Dakota";

which evidence is herein uncontroverted as fact by any admissible evidence herein to the contrary offered into the record by Respondents.

On the foregoing and herein by admissible evidence further proved up by June 14, 1993 (137), December 30, 1993 (338), January 24, 1994 (722) and January 25, 1994 (725) Affidavits of Petitioner, Petitioner had in fact never been charged and arrested for a felony, taken to a state mental hospital on an emergency mental commitment, nude at a church nor conducted himself as a pedophile; which facts are herein uncontroverted by any admissible evidence herein offered to the contrary by Respondents during the course of proceedings before the state trial court.

In that the broadcasts by Respondents:

1. Armstrong that Petitioner had in the greeted parishioners at a church,

been charged and arrested for a felony and thereafter taken to the state mental hospital on an emergency mental commitment; and

2. Hemmingsen that Petitioner had turned up naked at a church, was arrested for an alleged felony and by innuendo was a pedophile

were patently false and defamatory, Petitioner in writing on November 4, 1990 demanded that Respondents publicly retract their foregoing slanders:

"(s)o as to mitigate (Petitioner's) damages (t)hereafter and so as not to totally nullify (Petitioner's) opportunity to be elected as Circuit Judge on November 6, 1990, (Petitioner) demand(ed) that (Respondents) broadcast unqualified retractions of and apologize for their foregoing specified (slanders) of (Petitioner). . . (3);

which Respondents refused to so do in advance of the November 6, 1990 election, which Petitioner lost as a direct result of the slanders of Petitioners by Respondents.

With said media Respondents' refusal to publicly retract their slander, action (Civ. 90-2085) in the Second Judicial Circuit Court of South Dakota by his November 8, 1990 service (22,23,33) of copies of his Summons (1) and Complaint (4) on Respondents Midcontinent Broadcasting Corporation, Hemmingsen and Armstrong.

Because, in response to Petitioner's interrogatories, Respondent Armstrong refused to disclose the identities and locations of her anonymous co-conspiratorial joint tortfeasor Respondents John Doe A, B, D and E; Petitioner filed with the trial court his February 15, 1993 motion (106) for court order compelling Respondent Armstrong to disclose the "identities and locations" of Respondents John Doe A, B, D and E as required of Respondent Armstrong by SDCL 15-6-26 (b)(1).

Without a meaningful of record formal hearing thereon, the trial court made and entered its August 18, 1993 order (209) that Petitioner's foregoing;

"Motion to Compel (Respondent) Armstrong to disclose her confidential sources is denied" (210);

in objection to which ruling, Petitioner, in his February 28, 1994 motion that the trial court vacate its summary judgment in favor of Respondents, raised the federal question as to whether the aforesaid August 18, 1993 order:

". . . deprives (Petitioner) of his right to due process (discovery) of law (SDCL 15-6-33) guaranteed by. . . the Fourteenth Amendment to the United States Constitution" (558);

which aforesaid February 28, 1994 motion raising the foregoing federal question was, without hearing thereon as previously timely scheduled and noticed (580-81) by Petitioner to be held on March 24, 1994, denied by March 25, 1994 order (655) of the trial court. Petitioner appealed this order to the state appellant's court and, at page 32 of his state appellant's brief, argued that the trial court's order denying Petitioner's pretrial discovery of the identities of Respondents John Doe A, B, D and E constituted deprivation of Petitioner's right to "due process of law guaranteed by . . . the Fourteenth Amendment to the United States Constitution"; which argument the South Dakota Supreme Court in *Hopewell v. Midcontinent Broadcasting Corporation, et al.*, 538 N.W.2d 780, 782 (1995) rejected with its holding that Respondent Armstrong was not by discovery law obligated to disclose to Petitioner the identities and locations of her anonymous co-conspiratorial joint tortfeasor Respondents John Doe A, B, D and E because:

1. Petitioner had not theretofore exhausted "all alternative sources of obtaining the identities" of Respondents John Doe A, B, D, and E;

2. "(t)he information in the news story was important to the electorate in weighing the credibility of Hopewell and his campaign"; and

3. "Hopewell failed to show the statement was false."

The trial court further deprived Petitioner of his Fourteenth Amendment due process rights to timely of record court hearings and rulings on his motions through its following stated actions and inactions on Petitioner's:

A. February 15, 1993 Motion to Compel Admissions and Answers by (Respondent) Armstrong (106) wherein the court did not:

1. conduct the June 2, 1993 hearing as therein scheduled (127), but rather, without good cause of record shown as required by SDCL 15-11-4 and SDCL 15-6-16, *sua sponte* postponed (729) this hearing to be thereafter held on June 21, 1993,

2. have a record made of June 21, 1993 hearing as required by SDCL 15-15-1,2, nor

3. rule, as required by SDCL 15-6-77(a), on the aforesaid motion at the aforesaid hearings nor at the July 21, 1993 hearing thereafter scheduled by Petitioner for ruling thereon;

B. June 14, 1993 Motion for Court's Findings of Libel *Per Se* (135) whereon the court:

1. did not, as required by SDCL 15-6-7 (b)(1) and 15-6-77 (a), conduct June 21, June 30 and July 21, 1993 hearings as theretofore scheduled, and thereat rule on said motion,

2. without good cause of record shown as required by SDCL 15-11-4 and 15-6-16, *sua sponte* postponed the July 21, 1993 hearing thereon to October 22, 1993 by its July 21, 1993 order (186) and from October 22, 1993 to April 6, 1994 by its *sua sponte* October 6, 1993 order (281), and

3. *sua sponte* dismissed said motion without hearing by order (330) of October 15, 1993;

C. June 24, 1993 Motion for Order to Enjoin (Respondents) From Further Imputing that (Petitioner) Committed a Crime whereon the court:

1. did not, as required by SDCL 15-6-7 (b)(1) and 15-6-77 (a), conduct June 30 and July 21, 1993 hearings as theretofore scheduled, and thereat rule on said motion,

2. without good cause of record shown as required by SDCL 15-11-4 and 15-6-16, *sua sponte* postponed the July 21, 1993 hearing thereon to October 22, 1993 by its July 21, 1993 order (186) and from October 22, 1993 to April 6, 1994 by its *sua sponte* October 6, 1993 order (281), and

3. rendered said motion moot without hearing on April 6, 1994 as scheduled by the court by its preemptive January 7, 1994 order granting summary judgment (415) in favor of Respondents;

D. July 20, 1993 Motion to Reschedule Hearing on (Petitioner's) Motion to Amend Complaint and for Joinder of William Dunker and City of Sioux
Falls as Additional Parties (179) on which the court in its July 21, 1993

order (186) ruled that "(n)o hearing will be held on this motion . . . (as) (t)he court will thereon rule upon . . . written submissions"; and

E. October 13, 1993 Motion to Compel Appearance and Production of Documents (316) by Sioux Falls Assistant City Attorney Janet Brekke for which, on good cause therein shown by Petitioner, Petitioner sought (318) expedited hearing later that same day by discretionary order of the court pursuant to SDCL 15-6-6(d), and on which the court did not, as required by SDCL 15-6-7(b) (1) and 15-6-77 (a), on October 13, 1993 (350) conduct hearings and thereat rule as previously scheduled and noticed (318) (322) for hearing by Petitioner;

in objection to which delays and denials of hearings and rulings by the trial court, Petitioner, in his February 28, 1994 motion that the trial court vacate its summary judgment in favor of Respondents, raised the federal question whether the foregoing failures of the trial court to act on Petitioner's foregoing motions constituted deprivations of Petitioner's right to:

> "due process of State rules of civil procedure . . . guaranteed by . . . the Fourteenth Amendment to the United States Constitution" (555);

which aforesaid February 28, 1994 motion raising the foregoing federal question was, without hearing thereon as previously timely scheduled and noticed (580-81) by Petitioner to be held on March 24, 1994, denied by March 25, 1994 order (665) of the trial court. Petitioner appealed this order to the state appellate court and, at pages 27-29 of his state appellant's brief, argued that the trial court's foregoing delays and denials of hearing and rulings on Petitioner's foregoing motions deprived Petitioner of his rights:

> "to due process (SDCL 15-6-7 (b), 12(f) 15(a), 16, 19(a)(1), 30(a), 32(b), 32(d) (3) (A), 33(a), 34(a)(b)(c), 36(a), 37(a), 77(a), 15-11-4, 15-15-1,2) of law guaranteed . . . by . . . the Fourteenth Amendment to the United States Constitution";

which argument the South Dakota Supreme Court, in *Hopewell v. Midcontinent Broadcasting, et al., id.* at 783, rejected by its summary findings that:

> "Judge Konenkamp . . . bent over backwards to ensure that Hopewell was afforded due process. Hopewell was given every opportunity to be heard."

On October 26, 1993, Petitioner served a copy of his Fourth Amended Complaint (336) on Respondents; the material fact allegations in which

complaint herein, by operation of SDCL 15-6-8(d), stand admitted by Respondents for their failure to have herein served and filed their answer to said complaint as of them required by SDCL 15-6-7(a) to join issue herein.

Without answering Petitioner's foregoing Fourth Amended Complaint and contrary to the trial court's October 6, 1993 Order (282) that a:

> "hearing on all pending motions filed on or before March 1, 1994 will be held . . . on April 6, 1994";

Respondents scheduled a hearing on their forthcoming Motion for Summary Judgment to be held on January 3, 1994 and thereafter on December 21, 1993 served (376) their Motion for Summary Judgment (374), support Affidavit of Timothy M. Gebhart (366-67) with attached Exhibits A (368), B (369-70) and C (371-73), and Notice of Hearing thereon on Petitioner.

Based on therein stated objections (382-83) to admissibility of government records, affidavit and testimony theretofore without hearing adduced into the record by Respondents, Petitioner on December 28, 1993 served on Respondents his Motion for Orders (382) that the record be purged of confidential police (300) and mental health (285) records; contents of Dunker Affidavit (167, 462) unlawfully derived from confidential contents of SFPD case report (Appendix C) on conduct of Petitioner, with the official SFPD finding therein that Petitioner's conduct was not criminal, in the May 28, 1978 incident at issue herein; and all cross-examination deposition testimony of deponents Glenn Rivers and William Dunker that went beyond the scope of direct examination, was derived from confidential police and mental health records, constituted incompetent legal opinion, was based on hearsay and, in the libelous totality thereof, immaterial to any issue of fact or law at bar; hearing on which evidentiary objections and motion to strike was scheduled and noticed (384) by Petitioner to be held at the hearing theretofore scheduled by Respondents for their pending Motion for Summary Judgment on January 3, 1994.

In his continued, thus far twice failed, attempt to conduct discovery to the ends of (1) herein having Respondents John Doe A, B, D and E herein held accountable to Petitioner for their tortious and unconstitutional acts against Petitioner, and (2) herein of record conclusively establish the individual and collective malice of said unidentified Respondents in conspiracy with Respondents Armstrong, Hemmingsen and KELO; Petitioner on December 28, 1993 served (386) by Petitioner his Renewed Motion for Order to Compel Disclosure of Identities of (Respondents) John Doe A, B, D and E (385); hearing on which Motion was scheduled and noticed (386) to be held at the

January 3, 1994 hearing theretofore scheduled by Respondents for their pending Motions for Summary Judgment.

On December 30, 1993, Petitioner served his Affidavits of June 14, 1993 (390) and December 30, 1993 (388), June 10, 1993 Affidavit of Carol Teichroew (392), June 11, 1993 Certificate of Renee Briggs (393) and December 30, 1993 Affidavit of George Hahn (394) on Respondents; which were filed with the court in advance of the January 3, 1994 hearing on the foregoing motions by Respondents and Petitioner.

In the lines 18-25 in page 2 of the transcript of the January 3, 1994 hearing, the trial court at the outset of said hearing scheduled the sequential order in which he would consider the pending Motions by both parties as follows:

> "First of all I want to talk about the latest amended complaint and we will proceed with the motion for orders; and secondly we will proceed with the renewed motion to compel disclosure; . . . third the motion for judgment on the pleadings; and fourth the motion for summary judgment, and thereafter if there are any other matters we will visit about those before we are adjourned."

After hearing Petitioner's arguments on his Motions to file his Fourth Amended Complaint, for court rulings on his evidentiary objections to all the government records, affidavit, cross-examination deposition testimony of Rivers and Dunker and exhibits tendered into the record by Respondents in support of their Motion for Summary Judgment to the end of purging same from the record as sought in Petitioner's pending Motion for Orders, his Renewed Motion to Compel Disclosure, and his Motion for Judgment on the Pleadings as above requested and scheduled by the trial court at the outset of the January 3, 1994 hearing, the trial court did not rule on Petitioner's foregoing Motions, and, in advance of any hearing on Respondents' pending Motion for Summary Judgment, the court, as evidenced in lines 3 through 7 of page 14 of the January 3, 1994 hearing transcript, concluded the hearing by *sua sponte* ruling:

> "Excuse me, Mr. Hopewell, I'm going to consider the parties motions and written submittals and terminate this hearing as of now. You will be hearing from me in writing concerning my rulings on the various motions. Hearing is adjourned."

On January 3, 1994, it is, upon review of the transcript of the abbreviated January 3, 1994 proceeding, patently manifest that a hearing was not held on, Respondents' Motion for Summary Judgment in advance of the trial courts

unattested January 7, 1994 Order Granting Motion for Summary Judgment (472) and January 21, 1994 Judgment (458) thereon; in objection to which unattested Order and Judgment by the trial court, Petitioner, in his February 28, 1994 Motions for Court Order to Vacate Judgment and For Hearing Thereon, raised the federal question as to whether the trial court's failure on January 3, 1994 to conduct a hearing on Respondents' Motion for Summary Judgment:

> " . . . deprives (Petitioner) of his right to due process (hearing on motions) of law (SDCL 15-6-77 (a) . . . guaranteed (Petitioner) by . . . the Fourteenth Amendment to the United States Constitution . . . ."(580);

which aforesaid February 28, 1994 Motion raising the foregoing federal question was, without hearing thereon as previously timely scheduled and noticed (580-81) by Petitioner to be held on March 24, 1994, *sua sponte* denied by March 25, 1994 Order (665) of the trial court. At page 30 of Petitioner's October 3, 1994 state appellant's brief, Petitioner without success argued that the trial court's failure to conduct a hearing on Respondents' Motion for Summary Judgment constituted a denial of "procedural due process".

To be noted (416) in the January 7, 1994 Order Granting Motion for Summary Judgment, the signature of the trial court thereon has never been attested by the clerk of court as required by SDCL 15-6-58 to become "complete and effective when reduced to writing"; in objection to which void status of said Order, Petitioner, at pages 80-81 of his December 9, 1994 state appellant's brief, on appeal raised the federal question whether the lack of statutory attestation of the Order Granting Motion for Summary Judgment:

> "deprived (Petitioner) of due process and equal protection of law (SDCL 15-6-58) guaranteed by the Fourteenth Amendment to the United States Constitution";

which argument, together with Petitioner's foregoing argument that the trial court's failure to conduct a hearing on Respondent's Motion for Summary Judgment deprived Petitioner of Fourteenth Amendment due process right, the South Dakota Supreme Court in *Hopewell v. Midcontinent Broadcasting, et al., supra* at 783, rejected by its summary findings that:

> "Judge Konenkamp . . . bent over backwards to ensure that Hopewell was afforded due process. Hopewell was given every opportunity to be heard."

ARGUMENT

I

LOWER COURT SUPPRESSION OF IDENTITIES OF TORTFEASOR RESPONDENTS JOHN DOE A, B, D, AND E DEPRIVES PETITIONER OF HIS DUE PROCESS RIGHT TO LITIGATE HIS ACTION AT BAR

The order of the state trial court denying Petitioner's motion for court order to compel Respondent Armstrong to disclose the identities of her co-conspiratorial joint tortfeasor Respondents John Doe A, B, D and E, and the state appellate court's affirming thereof, are in conflict with *Garland v. Torre*, 259 F2d 545, 549-50 (CA2 1958), *certiorari* denied 358 US 910; which, in overruling a news reporter's claim that she had First Amendment right not to disclose the identity of an anonymous source of false and defamatory information, holds that the:

> ". . . First Amendment . . . must give place under the Constitution to a paramount interest in the fair administration of justice. 'The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of government' (Case cited.) . . . .
>
> ". . .The question asked of the appellant went to the heart of the plaintiff's claim. We hold that the Constitution conferred no right to refuse an answer."

As the "question" of the names of joint tortfeasor Respondents John Doe A, B, D and E goes "to the heart of " Petitioner's "claim" against said anonymous tortfeasors, with the lower courts' suppression of the identities of tortfeasor Respondents John Doe A, B, D and E, Petitioner is herein being denied his "right to sue" said annoymous tortfeasor Respondents "in the courts" by precedent and controlling authority of the *Garland* case as above quoted.

II

WITHOUT HAVING THERETOFORE CONDUCTED AN EVIDENTIARY HEARING ON THE MATERIAL FACTS HEREIN, TRIAL COURT'S *EX PARTE* FINDING THAT "THE RECORD FAILS TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT (RESPONDENTS) ACTED WITH ACTUAL MALICE" DEPRIVES PETITIONER OF HIS DUE PROCESS RIGHT TO A HEARING ON COURT FINDING

Without an evidentiary hearing on question whether Respondents acted with malice, the trial court in its *ex parte* January 7, 1994 Order (Appendix A - page 2A) dismissing Petitioner's action herein, *sua sponte* made its finding of fact that Petitioner failed:

> "... to establish by clear and convincing evidence that (Respondents) acted with actual malice . . . ."

There having been no evidentiary hearing on the court's foregoing quoted finding, Petitioner has hereinbelow been denied procedural due process of a hearing thereon in violation of the Fourteenth Amendment. *Fuentes v. Shevin*, 407 US 67, 80 (1972).

Where its denial of Petitioner's motion for order to compel media Respondent Armstrong to disclose the names of her joint tortfeasor government Respondents A, B, C, D and E estopped Petitioner from herein proving that Respondents individually and collectively acted with malice in their combined government and media attack against the election of Petitioner as judge, trial court's *ex parte* dismissal of Petitioner's action with its foregoing quoted *sua sponte* finding that Petitioner had failed to prove that Respondents herein acted with "actual malice" further constitutes denial of Petitioner's right to pretrial discovery, and jury trial thereafter, on question whether Respondents have herein acted with malice. With the foregoing the lower court have denied Petitioner procedural due process of law and jury trial in compounded violation of the Fourteenth and Seventh Amendments.

III

IN THEIR COMBINED COLLLECTION, FAILURE TO DESTROY AND PUBLICATION OF SFPD CASE REPORT 44 ABOUT PETITIONER'S CONDUCT, RESPONDENTS VIOLATED STATUTES AND REGULATIONS; FOR WHICH, BY SOUTH DAKOTA DOCTRINE OF NEGLIENCE *PER SE*, THEY ARE HEREIN AS A MATTER OF LAW LIABLE TO PETITIONER FOR MONEY DAMAGES

SDCL 23-5-1 in material part provides:

> **"The attorney general shall procure and file for record . . . information as may be pertinent of all persons who may hereafter be taken into custody for offenses** other than those arising solely out of the violation of fish, game, conservation, or traffic laws of this state with the exception of those persons charged with driving a motor vehicle while under the influence of alcoholic beverages, and also of all criminals

wheresover the same may be procured . . . " (Emphasis added);

from which statute the City of Sioux Falls derives its police power to compile a record of criminal offenses for which Petitioner may have been arrested, charged and convicted. The City of Sioux Falls did not, however, therefrom derive a police power to keep and, through its presumptive employees, Respondents A, B and D, disseminate contents of the noncriminal May 28, 1978 incident report [Appendix C - (300)] to Respondents Armstrong, Hemmingsen and Midcontinent Broadcasting for broadcast to the public in irreparable damage herein to Petitioner's ability to thereafter earn a living.

Where such is not authorized by SDCL 23-5-1 so as to protect the public at large from police collection of noncriminal data about the citizenry, in its unlawful compilation of a record about Petitioner which was not a record of criminal "offense" within the meaning of SDCL 23-5-1, the City of Sioux Falls, through its herein presumptive employees, Respondents John Doe A, B and D, have therewith, in their presumptive capacities as city officials, selectively denied Petitioner equal protection of law [SDCL 23-5-1] in violation of the Fourteenth Amendment.

Where precluded by state statute, city does not under color of its police power have right to keep report on Petitioner's conduct for which he had not been charged with a criminal offense and wherein he had been detained by police for a reason other than an arrest for a criminal offense; the keeping and dissemination of which denied Petitioner equal protection of preclusionary statute [SDCL 23-5-1] in unwarranted intrusion into Petitioner's life as respectively prohibited by the Fourteenth and Fourth Amendments.

SFPD Records Control Regulation 1201 in part provides:

> ". . . Records destruction shall comply with those guideline set forth in 'Managing Public Records' prescribed by the State of South Dakota Bureau of Administration Records Management Program."

In adoption of the above referenced police record destruction guideline promulgated by the South Dakota Bureau of Administration Records Management Program regarding the Police Case Report (Appendix C) at issue, SFPD Case Report Destruction Regulation 213, as it was in effect when on May 28, 1988 the SFPD Case Report (300) should have been destroyed and at the time (October 26, 1990) it was thereafter released by Respondent John Doe A to Respondent Armstrong, Hemmingsen and Midcontinent Broadcasting, in part provides:

"CASE REPORT . . . is used to provide background information and a narrative completed by the officer outlining circumstances of the initial contact and disposition of a case . . . . Retain 2 years in office, then transfer to storage for eight years. Destroy after 10 years provided the file has remained inactive without leads, for 1 year prior to disposal."

By requirement of the foregoing statute, the May 28, 1978 SFPD Case Report (Appendix C) should have been destroyed by the SFPD on May 28, 1988, more than two years before contents therof were read over the telephone by Respondent John Doe A to Defendant Armstrong on October 26, 1990.

SFPD Records Information Security Regulation 1202 in part provides:

"Federal and state law closely regulates the collection and dissemination of Criminal Records information. **Any criminal record information contained in the department's record system can only be shared with other law enforcement agencies and officers, and others in the criminal justice system, on a strict need and right to know basis** . . . Only Police Department personnel and Minnehaha County Sheriff's Office personnel will use the CRT terminals. **No information available on the CRT's will be given out to the general public** . . . ."

SDCL 1-27-1 in material part provides:

"In every case where the keeping of a record . . . is required of an officer or a public servant under any statute of this state, such record . . . shall be kept available and open to inspection by any person during the business hours of the office or place where the same is kept."

SDCL 1-27-3 provides:

"Section 1-27-1 shall not apply to such records as are specifically enjoined to be held confidential or secret by the laws requiring them to be so kept."

SDCL 23-5-10(1) provides:

"'Confidential criminal justice information,' criminal identification information complied pursuant to chapter 23-5, criminal intelligence information, criminal **investigative information**, criminal statistics information made confidential pursuant to § 23-6-14, and criminal justice information otherwise made confidential by law." (Emphasis added.)

SDCL 23-5-11 provides:

> "Section 1-27-1 does not apply to confidential criminal justice information."

Contents of the SFPD case report (300) on the May 28, 1978 incident at issue herein, being "investigative information'" within the meaning of SDCL 23-5-10 (1), are "'(c)onfidential . . . information'" by operation thereof, and thereby not subject to publication by prohibition of SDCL 1-27-3, 23-5-11 and SFPD Records Security Regualtion 1202.

For their undisputed violations of the foregoing cited and quoted SFPD Regulation 1202, SDCL 1-27-3 and 23-5-11 adopted and enacted to protect Petitioner from the publication of the SFPD report (300) of the May 28, 1978 incident at issue, all Respondents, save Respondent John Doe E, are herein liable to Plaintiff for damages as a matter of law by the South Dakota doctrine of negligence *per se*. *Dartt v. Berghorst*, 484 NW2d 891, 895 (S.D. 1992); *Snodgrass v. Nelson*, 369 FSupp 1206, *affirmed* 503 F2d 94 (CA8 1975).

By precedent of the above cited herein controlling case authority, Respondents John Doe E and Armstrong are likewise herein liable to Petitioner for damages as a matter of law for their individual and collective violations of SDCL 16-19-99; which in material part provides:

> "All proceedings involving allegations of misconduct by . . . an attorney shall be kept confidential until a formal complaint asking for disciplinary action is filed with the Supreme Court by the board or the attorney general . . .";

in violation of which statute, Respondent Armstrong, on information provided her by Respondent John Doe E, broadcast:

> "Sources also tell us Hopewell's conduct has been investigated by the Bar Association which is responsible for monitoring attorneys' actions, but those investigations and the results of them are confidential."

The lower courts' refusal to litigate Petitioner' claims that Respondents were, by the foregoing doctrine of negligence *per se*, liable as a matter of law to Petitioner for their undisputed violation of SDCL 1-27-3, 23-5-11 and 16-19-99 deprive Petitioner of his fundamental individual:

1. Fourth Amendment right "to be let alone" from unwarranted intrusion by

government by prohibition of *Stanley v. Georgia*, 394 US 557, 564 (1960), and raised in Petitioner's motion to vacate judgment in proceeding before the trial court and preserved on appeal in assignments of error numbers 7, 8, 12, 13 and 14 to the state appellate court and at pages 39-40, 42, 47, 52 and 55 of December 9, 1994 amended appellant's brief, argued to the state appellate court;

2. Fourteenth Amendment right to equal protection of foregoing confidentiality regulations and statutes, the selective nonenforcement of which by the lower courts solely for the reason that Petitioner was a candidate for election as a judge, conflicts with *Personnel Adm'r of Mass. v. Feeney*, 442 US 256 (1979) and *Reynolds v. Sims*, 377 US 533 (1964) which respectively hold that selective nonenforcement of statute "because of" the class status of the party denied protection of said statute and that anything less than uniform treatment standing in the same relation to the government action at issue violate the equal protection clause, and raised, in relation to SDCL 16-19-99, as a federal question at pages 79-80 of Petitioner's December 9, 1994 amended appellant's brief in his appeal to the state appellate court; and

3. Fourteenth Amendment right to procedural due process of prepublication court hearing to provide Petitioner with an opportunity to enforce his statutory right to preserve confidentiality of investigative police and disciplinary board records at issue by authority of *Wisconsin v. Constantineau*, 400 US 433, 437 (1971), *Corbitt v. Anderson*, 778 F2d 1471 (CA10 1985); *Utz v. Cullinance*, 520 F2d 467, 480-81 (CA-DC 1975), *Borunda v. Richmond*, 885 F2d 1384 (CA10 1988) and *Paul v. Davis*, 424 US 693, 702, 705 (1976) wherein this Court holds that, when the party defamed by government is so "stigmatized . . . with a badge of infamy" as to have, as is herein without question the case, "seriously impaired" his "liberty right . . . to earn a living", the party to be falsely defamed has prior right to procedural due process of court hearing whereat he may secure an order to enjoin government, quasi-governmental and media officials from their prospective violations of SFPD Regulations 213, 1202 and SDCL 1-27-3, 23-5-1, 23-5-11 and 16-19-99 to stop their retention and publication of the confidential government record in false defamation of Petitioner, which federal question was raised (574) by Petitioner in proceedings before the trial court and preserved on appeal in his assignment of error 12 and, at page 34 in his October 3, 1994 appellant's brief and pages 79-80 in his December 9, 1994 amended appellant's brief, argued to the state appellate court;

which "federal questions" were never of record adjudicated by the state trial and appellate courts in the action at bar.

As to Petitioner's Fourth Amendment right "to be let alone" by government:

> "The makers of our Constitution . . . conferred, as against the Government, the right to bel let alone - the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Dissent of Justice Louis Brandeis in *Olmstead v. US*, 277 U.S. 438, 478 (1928); quoted with approval and applied as the law in *Stanley v. Georgia*, 394 US 557, 564 (1969).

As to Petitioner's Fourteenth Amendment right to procedural due process to court hearing in advance of release herein of confidential government records to the public:

> " . . . Due process obligates the government to accord an individual all opportunity to disprove potentially damaging allegations before it disseminates information that might be used to his detriment. The proper forum for definitively adjudicating an individual's guilt or innoncence is a trial that conforms to constitutional strictures; if the government aborts that procedure . . . , the Constitution requires that he be treated as though he engaged in no criminal activity. For the government to disseminate an arrest record pertaining to the allegedly criminal episode, when it knows that employers may infer that the individual was guilty rather than innocent of the crime, effectively permits the government to inflict punishment despite the fact that guilt was not constitutionally established." *Utz v Cullinane*, 520 F.2d 467, 480-81 (CA D.C. 1977).

IV

RESPONDENTS HAVE HEREIN VIOLATED PETITIONER'S FIRST AMENDMENT RIGHT TO PURSUE ELECTION WITHOUT TORTIOUS INTERFERENCE FROM HIS POLITICAL OPPONENTS

Section 1 of the Article VII of the South Dakota Constitution provides:

> "Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right to suffrage."

Prerequisite to a "free . . . [[e]lection" between Petitioner and his ballot opponent was the 1990 Minnehaha County elector's right to be fully informed of all truths material to the elector's choice between Petitioner and his opponent free of surreptitious "interfere(nce)" therewith by a "civil . . . [power]" as above required by the controlling substantive law in prohibition of Respondent's tortious interference herein of the electoral relationship between Petitioner as candidate and the electorate.

The right of freedom of association between a candidate and his elector is a fundamental First Amendment right shared by candidates and their electorate. See *Lubin v. Parrish*, 415 US 709 (1974); *Illinois State Board v. Social Workers Party*, 440 US 173 (1979).

V

TRIAL COURT'S FAILURE TO ADJUDICATE PETITIONER'S MOTIONS AND EVIDENTIARY OBJECTIONS AND DISMISSAL OF PETITIONER'S ACTION WITHOUT HEARING DEPRIVES PETITIONER OF HIS DUE PROCESS RIGHT TO LITIGATE ACTION AT BAR

The state appellate court's findings that, with the state trial court's:

1. failure, in violation of SDCL 15-6-7(b)(1) and 15-6-77(a), to hold and timely rule on Petitioner's motions for order to compel Respondent Armstrong to disclose identity of Respondents John Doe A, B, D and E (106), for court findings of libel (135), for order to enjoin Respondents from falsely imputing in the record that Petitioner had committed a felony (144), for court joinder of William Dunker and City of Sioux Falls as additional parties defendant (179), for order to compel Sioux Falls city attorney Janet Brekke to be orally deposed by Petitioner (316) and for order to vacate summary judgment (558);

2. failure, in violation of SDCL 15-15-1,2, to have a record made of what the court purports (209) to be a June 21, 1993 hearing on Petitioner's motion for order compelling Respondent Armstrong to identify Respondents John Doe A, B, D and E;

3. without good cause of record shown as required by SDCL 15-11-4 and 15-6-16, *sua sponte* postponement to October 22, 1993 of a July 21, 1993 hearing on Petitioner's motions for court findings of libel and for order to enjoin Respondents from of record imputing that Petitioner

committed a crime; which October 22, 1993 hearing was, by *sua sponte* October 6, 1993 court order (281), postponed to April 6, 1994;

4. July 21, 1993 ruling (186) that there be no hearing on Petitioner's motion for joinder of William Dunker and City of Sioux Falls as additional parties defendant;

5. without service of a notice of August 18, 1993 hearing on Petitioner as required by SDCL 15-6-6(d), conducting a hearing, without motion by a party as required by SDCL 15-6-7(b), and thereat signing an unattested order (128) that, in violation of SFPD Regulation 1202 and SDCL 1-27-3 and 23-5-11, the SFPD turn over all of its records on Petitioner to the court for its inspection and production into the record as later deemed necessary by the court;

6. refusal to hear and make specific rulings on the merits of Petitioner's:

   a. six evidentiary objections (i.e., hearsay, incompetent opinion, lack of statutory certification, statutory confidentiality) to and motion to strike false and defamatory contents of the SFPD case report (300) of the May 28, 1978 incident at issue herein (572-4),

   b. six evidentiary objections to admissibility of and motion to strike (574-5) false and defamatory contents of the May 28, 1978 application for emergency treatment signed by SFPD patrolman Rivers (287)

   c. six evidentiary objections to the admissibility of, demand for retraction of libels therein, and motion to strike (564-8) the affidavit of William Dunker (462),

   d. five evidentiary objections to the admissibility of, demand for retraction of libels therein and motion to strike (560-3) the affidavit of James Ysbrand (464),

   e. six evidentiary objections to the admissibility of and motion to strike (576-7) all answers of Lt. Dunker to October 12, 1993 deposition questions by Respondents' attorney,

   f. six evidentiary objections to admissibility of and motion to strike (576-7) answers of Sgt. Rivers to October 12, 1993 pretrial deposition questions by Respondents' attorney; and

   g. three evidentiary objections to admissibility of and motion to strike

(578-9) October 23, 1990 newspaper article (360) on May 28, 1978 incident at bar;

7. failure to hold hearing duly scheduled and noticed (318) to be held on October 13, 1993 or thereafter adjudicate Petitioner's motion (316) for court order to compel SFPD attorney Janet Brekke to orally answer questions (433-4) to her deposed by Petitioner as to her theretofore unrevealed role, either as Respondent John Doe A, B, D or as an accomplice thereof in conspiracy with Respondent Armstrong, in the October 26, 1990 release of the false and defamatory contents of the confidential SFPD case report (300) on the May 28, 1978 incident to Respondent Armstrong for subsequent broadcast by Respondents Armstrong and Hemmingsen; and

8. without hearing, on January 7, 1994 making an unattested order (416) granting Respondents' motion for summary judgment and therewith dismissing Petitioner's fourth amended complaint;

"Hopewell was afforded due process" and was "given every opportunity to be heard", *Hopewell v. Midcontinent Broadcasting, et al., supra* at 783, conflicts with *Fuentes v. Shevin*, 407 US 67, 80 (1972), which holds:

> ". . . It is . . . fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"

VI

IN NOT (A) ALLOWING PETITIONER TO COMPLETE DISCOVERY (B) REQUIRING RESPONDENTS TO ANSWER PETITIONER'S COMPLAINT, (C) DETERMINING WHETHER MATERIAL FACTS REMAINED IN DISPUTE, AND (D) HEARING AND RULING ON PETITIONER'S UNADJUDICATED MOTIONS AND EVIDENTIARY OBJECTIONS IN ADVANCE OF ITS SUMMARY JUDGMENT FOR RESPONDENTS; TRIAL COURT HAS DENIED PETITIONER PROCEDURAL DUE PROCESS OF LAW

As Petitioner's discovery has been herein obstructed by orders (210, 350) of the trial court, the summary judgment herein granted by the trial court and upheld by the appellate court conflicts with *Anderson v. Liberty Lobby*, 477 US 242, 257 (1990), which holds that summary judgment should not be granted where the nonmoving party has not, as in the case at bar, "had a full opportunity to conduct discovery."

In advance of its January 7, 1994 order (472) granting Respondents' motion for summary judgment, the trial court had not theretofore adjudicated questions (Did Respondent Armstrong broadcast that Petitioner had been "charged" with a crime? Did Respondent Hemmingsen in his broadcast impute tha Petitioner was a pedophile?) of disputed material facts remaining at issue between the parties. The trial court's failure to so adjudicate the foregoing questions of material fact on the merits in advance of entertaining Respondents' motion for summary judgment and thereon making its order for summary judgment is herein reversible procedural due process error by precedent and controlling authority of *US v. Allen*, 578 F2d 236 (CA9 1978). *See also Roterman v. U.S. Steel*, 472 US 1139 (1973) .

On the fair administration of justice principle above enunciated by this Court in *Anderson v. Liberty Lobby* and *Roterman v. U.S. Steel*, it should follow that:

1. Respondents having, in advance of their motion for summary judgment, not answered Petitioner's fourth amended complaint,

2. the court having not heard and ruled on Petitioner's pending objections to admissibility of and motions to strike evidence adduced, but not offered in an evidentiary hearing by Respondents, into the record, and

3. the court not having conducted a hearing on the merits of Respondents' motion for summary judgment;

should likewise by this Court be held herein to constitute reversible procedural due process errors by the state trial court.

CONCLUSION

Respondents Armstrong, Hemmingsen and Midcontinent Broadcasting Corporation have since October 26, 1990 conspired, and herein continue to conspire with Respondents John Doe A, B and D, to not reveal the identities of these anonymous joint tortfeasor Respondents who, given their official access to SFPD Case Report No. 44 [Appendix C], are presumably employees of the City of Sioux Falls, so as to herein bar Petitioner's recourse to the state and federal courts to litigate his justifiable 42 USC 1983 action against the City of Sioux Falls and its herein anonymous joint tortfeasor Respondent employees John Doe A, B and D.

> "'**The right to sue and defend in the court is the alternative to force**. In an organized society, it is the right conservative of all other rights, and lies at the very foundation of orderly government.'" *Garland v. Torre*, *supra* at 50, quoting with approval *Chambers v. Baltimore & Ohio R. Co.*, 207 US 142, 148 [1907]. (Emphasis added.)

Justice delayed is Justice denined.

On the foregoing facts, procedural history and law at bar, Petitioner prays that the Court grant this Petition for Writ of Certiorari to the South Dakota Supreme Court.

Respectfully resubmitted this 26th day of May, 1996.

Richard Hopewell
Petitioner *pro se*.
423 South Phillips Avenue
Sioux Falls, SD 57104
(605) 3334-0982

APPENDIXES

APPENDIX A

STATE OF SOUTH DAKOTA - COUNTY OF MINNEHAHA
SECOND JUDICIAL COURT

* *

*

Richard Hopewell, 90-2580

*

Plaintiff,

* ORDER GRANTING MOTION

vs. FOR SUMMARY JUDGMENT

*

Midcontinent Broadcasting Corp.,
ET AL.
Defendants [partial]

*

* *

This matter came on for hearing on Monday, January 3, 1994 at 9:00 A.D. before John K. Konenkamp, Circuit Court Judge, at the Pennington County Courthouse, Rapid City, South Dakota, Mr. Richard Hopewell, Esq. appeared by telephone representing himself and Mr. Timothy M. Gebhart, Esq. appeared by telephone on behalf of Defendants. After hearing arguments and considering the written submissions, including the affidavits and depositions, it is hereby

ORDERED,

. . . Defendant's "MOTION FOR SUMMARY JUDGMENT" is granted for the following reasons:

VIOLATION OF CONFIDENTIALITY AND PRIVACY

a) An alleged violation of SDCL 16-19-99 does not create a right to a separate cause of action. The remedy for an alleged violation is contempt before the South Dakota Supreme Court.

b) Even if an alleged violation of this statute creates a right to a

separate se of action, Plaintiff cannot recover unless he can establish that the published information concerning a bar investigation was false. *Lence v. Hagadone Investment Co.*, 853 P 2d 1230, 1236 (Mont. 1993). Plaintiff has submitted no facts to establish the falsity of the report of a bar examination.

c) The public has a compelling interest in the integrity of its judiciary which outweighed Plaintiff's expectation of privacy at the time he was a judicial candidate.

LIBEL AND "IMPUTED LIBEL"

a) Richard Hopewell as a candidate for Circuit Judge was a public figure at the time the alleged libelous statements were rendered.

b) A public figure may recover damages for alleged defamation only upon a showing of "actual malice." Actual requires a showing that Defendants actually knew that the defamatory statements were false or acted with reckless disregard of the truth.

c) In ruling on a motion for summary judgment the court must use the "clear and convincing" evidentiary standard in determining whether a genuine issue of malice exists -- that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity.

d) The version of the incident of May 28, 1978 as set forth in the Defendants'' Brief in Support of Motion for Summary Judgment are virtually uncontradicted. In reporting this incident and the other public admissions Plaintiff made, the record fails to establish by clear and convincing evidence that Defendants acted with actual malice and no reasonable jury would conclude otherwise.

Defendants' counsel may submit for the court's signature a judgment dismissing all of Plaintiff's claims with prejudice.

Dated at Rapid City, South Dakota, this 7th day of January, 1994.

BY THE COURT
/s/ John K. Konenkamp
John K. Konenkamp
Circuit Court Judge

[NO ATTESTATION ON ORIGINAL]

APPENDIX B

SUPREME COURT OF SOUTH DAKOTA

* *

Richard Hopewell,	*	90-2580
Plaintiff,	*	OPINION
vs.	*	
Midcontinent Broadcasting Corp., ET AL, Defendants	*	[partial]

* *

Consider on Brief April 25, 1995
Decided October 18, 1995

Former judicial candidate brought libel action against television station and reporter. The Circuit Court, Second Judicial Circuit, Minnehaha County, John K. Konenkamp, J., entered judgment against former candidate, and he appealed. The Supreme Court, Gors, Circuit Judge, held that (1) qualified privilege extended to identity of source of news story underlying the libel action (2) open court provisions of state and constitution does not guarantee successful litigation; and (3) former candidate received due process.

Affirmed.

GORS, Circuit Judge

FACTS

[1] In 1990, Richard Hopewell ran for Second Circuit Judge in Sioux Falls against incumbent, Gene Paul Kean. Hopewell said some nasty things [1] about

Judge Kean, which were not true. Jessica Armstrong and Steve Hemmingsen

broadcast some nasty things about Hopewell on KELO TV, which were true [2]. KELO ran this news story at 6 p.m. on October 26, 1990:

> [E]arlier this week 53-year-old Richard Hopewell admitted he spent 10 minutes in Alick Drug in the buff because someone slipped him PCP. KELO-Land News has learned Hopewell ended up being arrested that same day for attempted rape. Records indicate Hopewell walked into an acquaintance's house in north Sioux Falls. While the man on the phone downstairs, Hopewell allegedly started to pull the man's wife out of bed and started to disrobe her. After being forced from the house, sources say Hopewell headed to St. Joseph's Cathedral where he allegedly greeted parishioners in the nude. Hopewell was later arrested for attempted rape and the next day was taken to Yankton State Hospital on an emergency mental commitment, so the case has been dismissed.
>
> Sources also tell us Hopewell's conduct has been investigated by the Bar Association, which is responsible for monitoring attorneys' action, but those investigations and the results of them are confidential.

KELO ran a follow-up story at 10 p.m. the same evening:

Dick Hopewell, the Sioux Falls lawyer who's running for judge, tonight categorically denies the latest information about his past, a story that start with his admission that he walked naked into [a] Sioux Falls drug store 12 years

[1] Hopewell claimed that Judge Kean's campaign was financed by big money interests. Hopewell publicly accepted and announced the names and amounts of campaign contributions and challenged Judge Kean to do the same. Hopewell criticized Judge Kean's sentencing practices and called Kean a "judicial reactionary" who made criminal appointments based on patronage rather than competency. Hopewell criticized Judge Kean's handling of the Yarnall case. See,

Yarnall v. Yarnall, 460 N.W.2d 161 (S.D.1990). Hopewell's statements and actions were violations of the Rules of Professional Conduct and the Code of Judicial Conduct. Matter of Discipline of Hopewell, 507 N.W.2d 911 (S.D.1993).

[2] See, footnote 8, infra

ago. KELO-Land News has learned there is more to that incident, including an arrest for the alleged attempted rape of a woman acquaintance in her home.

After being run out of the house, according to our sources. Hopewell turned up still naked at St. Joseph's Cathedral. Our sources tell us the matter wasdropped when Hopewell was taken to a mental hospital on an emergency commitment.

Hopewell tells us tonight it's all prevarication and distortion, that it, lies.

Hopewell lost the election [3] and his license [4] Hopewell sued KELO[5] Circuit Judge John K. Konenkamp granted summary judgment from which Hopewell appeals. We affirm.

Hopewell listed thirty issues in his docketing statement and twelve in his *pro se* brief. This appeal boils down to two issues.

CONFIDENTIALITY OF NEW SOURCES

The first issue is whether the trial court should have compelled Armstrong to divulge the sources of the information contained in the broadcasts.

[2-4] "Shield law" protect journalists from being required to divulge confidential sources of information. "Absolute" shield laws prevent compelled disclosure in all situations. A "qualified privilege" protects confidential news sources under certain circumstance and requires disclosure under other circumstances. South Dakota does not have a shield law and Armstrong has not requested absolute protection against compelled disclosure.

[3] 33,793 votes for Judge Kean to 6,506 votes for Hopewell. Official Election Returns and Registration Figures for South Dakota, General Election November 6, 1990, published by Joyce Hazeltine, South Dakota Secretary of State.

[4] Matter of Discipline of Hopewell, 507 N.W.2d at 918. Reinstatement was denied. Matter of Hopewell, 529 N.W. 2d 578 (S.D. 1995)

[5] Midcontinent Broadcasting Corporation d/b/a Keloland News, Steve Hemmingsen, Jessica Armstrong, John Doe A, John Doe B, John Doe D and John Doe E.

Since there are times when disclosure may be appropriate[6] or necessary[7], we decline to adopt an absolute privilege. However, news sources may be subject to harassment or more serious danger if their identity is disclosed. In addition, journalist should not have to prepare a litigant's case. Therefore, we hold that

a "qualified privilege" protects confidential news sources from disclosure under certain circumstances.

[5] We adopt the five factors set out in *Mitchell v Superior Court* (Synanon Church), 37 Cal.3d 268, 208 Cal.Rptr. 152, 159-62, 690 P.2d 625, 632-35 (1984) for trial courts to consider when deciding whether to compel disclosure.

(1) NATURE OF THE LITIGATION. Disclosure is more appropriate if the news person is a party (not merely a witness), particularly in libel cases.

(2) RELEVANCE. The information must go to the heart of the lawsuit.

(3) ALTERNATIVE SOURCES. The plaintiff must exhaust all alternative methods of getting the information.

(4) IMPORTANCE OF CONFIDENTIALITY. In matters of great public importance where the risk of harm is substantial, the court should protect confidential informants who fear exposure and retaliation if they reveal criminal and unethical conduct to the public even if the plaintiff has no other way to obtain the information.

(5) THE STATEMENT IS FALSE. The plaintiff must make a prima facie showing that the statement is false.

Hopewell wanted to know who told Armstrong about the incident at St. Joseph's Cathedral.

[6] In criminal proceedings, the interest of the public law enforcement and the defendant in discovering exculpatory evidence may outweigh the journalist's need for confidentiality. Our decision in this case relates to civil litigation only.

[7] Disclosure of the confidential source may be the only way to obtain evidence.

Application of the first factor, the *nature of the litigation*, favors disclosure is not automatic in libel cases.

The second factor, *relevance*, also favors disclosure. The information sought must go to the heart of the matter. Here, the informant's reliability and Armstrong's efforts to verify the information were central to proving actual malice.

Scrutiny of the third factor, *alternative sources*, favors confidentiality. At the time of his motion, Hopewell had not attempted any other discovery. The trial court gave him an opportunity to try other sources. Although Hopewell subsequently deposed two police officers, he failed to exhaust all alternative sources of obtaining the information.

Consideration of the fourth factor, the *importance of confidentiality*, favors protection of the source. A judicial election is a matter of great public concern. Integrity is a primary factor in selecting a judge. The information in the news story was important to the electorate in weighting the credibility of Hopewell and his campaign. Sources of information about criminal and unethical behavior need the press and the courts to protect them from exposure and possible retaliation.

Resort to the fifth factor, whether *the statement is false*. tips the balance in favor of confidentiality. If analysis of the first four factors remains close, the trial court may require the plaintiff to make a prima facie showing that the statement is false before discovery is ordered. Hopewell failed to show the statement was false[8].

[8] In fact, the broadcast were substantially true. The evidence before Judge Konenkamp established that if a few minor details were removed or corrected, the broadcast was essentially correct. Hopewell had already admitted the most damning allegation in the KELO story in a statement given to Sioux Falls Argus Leader, the largest circulating newspaper in South Dakota, on October 23, 1990, just three days before the broadcast: "It's true I was found nude at the Alick Drug. It should be noted, however, that it occurred as a result of an hallucinogenic experience induced by my having been surreptitiously drugged with what I'm told is called PCP by a secret agent of a political adversary who was noted for his dirty tricks and unethical behavior, and is now very probably allied with Gene Paul Kean and who may well have advanced this information to you for purposes of my campaign embarrassment."

Hopewell was afforded the opportunity to move for disclosure of the sources again if he made the requisite showings. He did not.

DUE PROCESS

The second issue is whether Hopewell was afforded due process.

[6] Hopewell claims the trial court denied him due process and on open forum. Apparently, Hopewell equates the "open courts" provisions of Section 20 of Article VI of the South Dakota Constitution with winning. The court was open to Hopewell and his suit. Every case has a loser and Howell lost this one.

The record in this case is *voluminous*. There are 738 pages in two separate volumes of the file plus another volume of miscellaneous filings and briefs. There are four amended indexes. There are seven separate transcripts. Hearings were held before Judge Srstka on December 18, 1991 (on a motion to dismiss for failure to prosecute by Hopewell), and before Judge Konenkamp on July 23, August 17 and October 15, 1993, and January 4, 1994.

[7] Judge Konekamp was patient and polite in difficult circumstances and bent over backwards to ensure that Hopewell was given every opportunity to be heard. Summary judgment was only granted when Hopewell made no showing of actual malice[9] to generate a genuine issue of material fact to support a trial on his libel claims. *Janklow v. Viking Press*, 459 N.W.2d at 419; *Wilson v. Great Northern Railway Company*, 83 S.D. 207, 157 N.W.2d 19 (1968).

DECISION

The trial court's summary judgment for KELO is affirmed.

[9] Hopewell needed to produce evidence that would support a reasonable jury finding of actual malice by clear and convincing evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Janklow v Viking Press, 459 N.W.2d 415, 419 (S.D. 1990)

MILLER, C.J., SABERS and GILBERTSON, JJ., and JOHNS, Circuit Judge, concur. JOHNS, Circuit Judge for KONENKAMP, disqualified.

GORS, Circuit Judge, for AMUNDSON, J., disqualified.

APPENDIX C

SIOUX FALLS POLICE DEPARTMENT CASE REPORT NO 44

[In material part with inadmissible false and defamatory material deleted therefrom]

INCIDENT OR OFFENSE	DATE AND TIME OF INCIDENT OR OFFENSE
#44-Mental Illness	10:45 hours-May 28,1978

REPORTING OFFICER	DATE AND TIME OF REPORT
Glenn Rivers-#43	May 28, 1978 1550 hours

[REDACTED MATERIAL]

FOLLOW UP ASSIGNED TO	DATE
R. Bacon	MAY 29 1978
REASSIGNED TO	DATE

OFFENSE OR INCIDENT DECLARED:

- UNFOUNDED ☐
- CLEARED BY ARREST ☐
- EXCEPTIONALLY CLEARED ☑
- INACTIVE - NOT CLEARED ☐

Supreme Court, U.S.
FILED
JUL 3 1996
CLERK

No. 95-1954

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RICHARD HOPEWELL,

Petitioner,

v.

MIDCONTINENT BROADCASTING CORPORATION d/b/a KELOLAND NEWS, STEVE HEMMINGSEN, JESSICA ARMSTRONG, JOHN DOE A, JOHN DOE B, JOHN DOE D and JOHN DOE E,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

BRIEF IN OPPOSITION

Timothy M. Gebhart
Counsel of Record for Respondents
DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.
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QUESTIONS PRESENTED

1. Is the Petition for Writ of Certiorari timely?

2. Does the Court have jurisdiction over the issues presented by the Petition for Writ of Certiorari?

3. Does this case present issues appropriate for this Court's review under a writ of certiorari?

LIST OF PARTIES

Petitioner is Richard Hopewell, an attorney whose license to practice law was suspended due to his actions in the election giving rise to this litigation.

Respondent Midcontinent Broadcasting Corporation is a wholly owned subsidiary of Midcontinent Media, Inc. Neither corporation is publicly held. At the times relevant to this lawsuit, Midcontinent Broadcasting owned and operated KELO TV, a television station in Sioux Falls, S.D. Respondents Steve Hemmingsen and Jessica Armstrong are reporters for KELO. The John Doe defendants have never been identified or served with process.

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IN THE

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Respondents.

On Petition for Writ of Certiorari
To the Supreme Court
Of the State of South Dakota

BRIEF IN OPPOSITION

Respondents Midcontinent Broadcasting Corporation, Steve Hemmingsen and Jessica Armstrong request the Court deny the Petition for Writ of Certiorari seeking review of a decision of the South Dakota Supreme Court. That decision is reported at 538 N.W.2d 780. For the Court's convenience, citations to the South Dakota Supreme Court's opinion will be to the

appendix to the Petition for Writ of Certiorari.[1]

STATEMENT OF JURISDICTION

This Court does not have jurisdiction because the case does not present issues reviewable under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

In the spring of 1978, Petitioner was arrested, stark naked, in a Sioux Falls, S.D., drug store. He was placed under arrest for attempted rape by local police. Petitioner ran for state judicial office in 1990. During the campaign, his arrest was the subject of coverage by local news media. Respondents broadcast news stories about the 1978 events and arrest. Within two weeks, Petitioner sued them for libel.

During the course of the litigation, Petitioner attempted to obtain the identify of confidential sources used in preparing the stories. The state trial judge ruled the reporters had a qualified privilege under state law not to disclose their sources. The judge also ruled on three occasions that Petitioner had not made the showing necessary to defeat the qualified privilege. In January 1994, the trial court granted summary judgment to Respondents. The trial court's rulings were affirmed by the South Dakota Supreme

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[1]Petitioner has since filed yet another corrected Petition. All citations to the Petition are to the one docketed by the Clerk on June 3, 1996. None of the three Petitions complies with Supreme Court Rule 33.

Court in October 1995. Petitioner seeks review of that decision.

ARGUMENT

Rule 15.1 mandates counsel bring misstatements of fact to the Court's attention. Misstatements permeate the Petition. To correct them all would require more pages than the rules allow.

The most blatant distortion is the first sentence of the Statement of the Case. Petitioner asserts that on May 28, 1978, he was detained by police "for an official of record reason other than an arrest for a criminal offense." Petition at 5. This is not true. When Petitioner was placed in custody the officer filled out an "ARREST REPORT" stating he was "arrested" for the "offense" of "Attempted Rape." In reproducing a case report at Page 11A of the Petition, Petitioner deletes the text of the report, which states, among other things, that he was "lodged on attempted rape charges." The police officers testified Petitioner was arrested for attempted rape. Deposition of Glenn Rivers at 20, 21-22, 24, 29, 30-31, 32-33, 48, 49, 50; Deposition of William Dunker at 26. Petitioner simply wants to ignore what actually happened.

Petitioner's version of the procedural history of his lawsuit is likewise so divorced from the truth as to appear to be a product of delusion. Suffice it to say that the South Dakota Supreme Court specifically noted the trial judge "bent over backwards" to allow Hopewell to present his case. Petition at 10A.

I. THE PETITION IS UNTIMELY.

Petitioner attempted to file his Petition for Writ of Certiorari on or about March 16, 1996. The Petition did not comply with the rules. By letter dated March 27, it was returned to Petitioner for correction pursuant to Supreme Court Rule 14.5. That rule provides: "A corrected petition received no more than 60 days after the date of the Clerk's letter will be deemed timely." (Emphasis added).

The cover letter attempting to transmit the so-called corrected Petition[2] was dated May 28, 1996. As a result, it was not received until after that date and the Petition was untimely.

II. THE JURISDICTIONAL GROUNDS FOR A WRIT OF CERTIORARI ARE NOT MET.

The Petition asks this Court to review a decision of the South Dakota Supreme Court. This Court's power to exercise its jurisdiction in that respect is limited. This Court may exercise jurisdiction under a writ of certiorari only when (1) the validity of a treaty or statute of the United States is drawn into question, (2) a state statute is claimed to be repugnant to the United States Constitution or laws, or (3) federally granted rights or privileges are claimed to be affected. 28 U.S.C. § 1257(a). Similarly, this Court's rules indicate certiorari is to be granted to review a decision of a state

---

[2]The new petition raises issues not presented in the first petition.

court of last resort that involves important questions of federal law. Sup. Ct. R. 10(b), (c). Review of the decision below shows these situations are not presented.

Plaintiff has narrowed the issues from 30 at the state level, Appendix at 7A, to 10 here. The fact is the South Dakota Supreme Court addressed two issues. The first was whether journalists have a qualified privilege under South Dakota law to refuse to disclose confidential sources of information. *Id.* at 7A-9A. Matters of privilege in actions under state law are issues of state law. *Cf.* Fed. R. Evid. 501 (when a federal court hears a civil action in which state law provides the rule of decision, "the privilege of a witness . . . shall be determined in accordance with State law"). This Court has no authority to review state determinations of purely state law. *International Longshoremen's Association, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). *See also Agins v. City of Tiburon*, 447 U.S. 255, 259 n.6 (objections to a state supreme court's application of state law does not raise a federal question appropriate for review by this Court). Thus, the South Dakota Supreme Court's recognition of a qualified reporter's privilege is not subject to review by a writ of certiorari.

The other issue addressed by the South Dakota Supreme Court was whether Petitioner was afforded rights granted him by the South Dakota Constitution. Petition at 9A-10A. In ruling on his due process claims, the Court said:

> Apparently, Hopewell equates the "open courts" provision of Section 20 of Article VI of the South Dakota Constitution with winning. The court was open to Hopewell and his suit. Every case has a loser and Hopewell lost this one.

Id. at 10A. Plainly, the decision was predicated on application of the state constitution. Petitioner himself concedes that his claimed federal questions "were never of record adjudicated by the state trial and appellate courts in the action at bar." Petition at 23. "[B]y invoking a state constitutional provision, a state court immunizes its decision from review by this Court." *Payton v. New York*, 445 U.S. 573, 600 (1980). If, as here, a state court decision indicates clearly and expressly that it is based on bona fide separate, adequate and independent state grounds, this Court will not review the decision. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

Finally, a comparison of the issues listed in Petitioner's brief to the South Dakota Supreme Court and his Petition to this Court reveals that only Issues I, IX and X were raised before the South Dakota Supreme Court. This Court will not address claims not raised below. *See Yee v. City of Escondido*, 503 U.S. 519, 532-33 (1992). As a result, this Court has no jurisdiction to address Issues II, III, IV, V, VI, VII and VIII.

III. PETITIONER'S CLAIMS LACK MERIT.

Assuming *arguendo* that this Court can address Petitioner's due process claim, it is without merit. The fundamentals of due process are notice and an opportunity to be heard. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985). The South Dakota Supreme Court noted that "Hopewell was given every opportunity to be heard." Petition at 10A. There is no doubt of this. The trial court record is more than 700 pages, there were seven separate transcripts and at least five hearings were held. *Id.* Petitioner served discovery requests; filed numerous motions, affidavits and pleadings; took depositions; and was represented and/or appeared at each hearing. Any claimed denial of due process is ludicrous.

This Court also must not lose sight of the fact this is a libel action. A defamation plaintiff must establish that the statements at issue are false. S.D. Const., art. VI, § 5 ("In all trials for libel . . . the truth . . . shall be a sufficient defense"). In fact, because Petitioner was a candidate for office, the defense of truth is constitutionally required. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490-91 (1975). The South Dakota Supreme Court declared that what Respondents broadcast was true. Petition at 6A, 9A, n.8. Numerous courts have recognized the chilling and devastating effect prolonged libel litigation can have on first amendment interests. *See, e.g., Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850, 853 (8th Cir. 1979);

Anderson v. Stanco Sports Library, Inc., 542 F.2d 638, 641 (4th Cir. 1976); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 864-65 (5th Cir. 1970) and cases cited therein. Respondents have borne the expense of nearly six years of litigation for broadcasting true statements about a candidate for judicial office. It is time for the travesty to end.

CONCLUSION

Respondents request the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(3)

Case 95-1954

Supreme Court, U.S.
FILED
SEP 24 1996
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

RICHARD HOPEWELL,

Petitioner,

vs.

MIDCONTINENT BROADCASTING CORPORATION *d/b/a* KELOLAND NEWS, STEVE HEMMINGSEN, JESSICA ARMSTRONG, JOHN DOE A, JOHN DOE B, JOHN DOE D *and* JOHN DOE E,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS RAISED BY OPPOSITION BRIEF

I

WITH NO ADMISSIBLE EVIDENCE IN SUPPORT THEREOF AND IN HEREIN CONTINUING LIBEL OF PETITIONER, ARE RESPONDENTS MANUFACTURING EVIDENCE IN THEIR BRIEF THAT PETITIONER WAS ARRESTED FOR A CRIME?

Petitioner's answer at pages 4 through 8, *infra.*

II

DID LOWER APPELLATE COURT MAKE FINDINGS OF FACT THAT RESPONDENTS' HEREIN COMPLAINED OF BROADCASTS WERE TRUE?

Petitioner's answer at pages 9 through 11, *infra.*

III

IN REFUSING TO HOLD HEARINGS ON 6 MOTIONS, AND RULE ON 38 EVIDENTIARY OBJECTIONS, BY PETITIONER AND *SUA SPONTE* GRANTING *EX PARTE* ORDERS FOR RESPONDENTS, DID TRIAL COURT "BEN[D] OVER BACKWARDS TO ENSURE THAT [PETITIONER] WAS GIVEN EVERY OPPORTUNITY BE HEARD"?

Petitioner's answer at pages 11 through 13, *infra.*

IV

IN VIOLATION OF STATE CONSTITUTION, DID LOWER COURTS ABROGATE RESPONDENT ARMSTRONG'S STATUTORY DUTY BY REQUIREMENT OF SDCL 15-6-26 TO DISCLOSE NAMES OF THE ANONYMOUS JOINT

TORTFEASOR SOURCES OF HER FALSE BROADCASTS ABOUT PETITIONER?

Petitioner's answer at pages 13 through 15, *infra.*

V

DID SOUTH DAKOTA SUPREME COURT'S REFUSAL TO ADJUDICATE TEN OF TWELVE JUSTICIABLE ISSUES IN PETITIONER'S APPEAL CONSTITUTE PETITIONER'S 14TH AMENDMENT RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF STATUTORY RIGHT TO APPEAL TOTALITY OF TRIAL COURT'S JUDGMENT TO STATE SUPREME COURT?

Petitioner's answer at page 15 through 16, *infra.*

VI

SECTION 20 OF ARTICLE VI OF STATE CONSTITUTION BEING BUT A RESTATEMENT OF 14TH AMENDMENT DUE PROCESS CLAUSE, DOES STATE SUPREME COURT HOLDING THAT STATE TRIAL COURT WAS "OPEN TO [PETITIONER]" CREATE AN "INDEPENDENT STATE GROUND" WHICH PRECLUDES THIS COURT FROM REVIEW OF 14TH AMENDMENT DUE PROCESS QUESTIONS HEREIN?

Petitioner's answer at pages 16 through 18, *infra.*

VII

WERE FEDERAL QUESTIONS I-III AND V-X RAISED BY PETITIONER IN LOWER COURTS AND QUESTION IV FAIRLY INCLUDED IN QUEESTIONS III, V, VI, VII AND VIII SO AS TO THEREBY BE HEREIN REVIEWABLE BY THE COURT?

Petitioner's answer at page 18 through 19, *infra.*

VIII

IS LATE RECEIPT OF CONFORMED PETITION BY CLERK A BAR TO THIS COURT'S REVIEW THEREOF?

Petitioner's answer at page 19, *infra.*

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CORRECTED REPORT OF LOWER COURT OPINION

In the Petition for Writ of Certiorari , the citation therein of the reported opinion of the lower state appellate court is deficient for want of the page number of said opinion and the citation thereof should thereby be corrected to be 538 N.W.2d 780 (S.D. 1995). A copy of said opinion also attaches as Appendix B to the Petition for Writ of Certiorari on file herein. Hereafter referenced Appendixes A and C are likewise attached to said Petition.

STATE CONSTITUTIONAL PROVISION

Section 21 of Article VI of the South Dakota Constitution provides:

> "No power of suspending law shall be exercised, unless by the Legislature or its authority."

STATE STATUTES AND CITY REGULATIONS PROHIBITING COMPILATION, RETENTION AND PUBLICATION OF GOVERNMENT RECORDS ABOUT PERSONAL CONDUCT OF PETITIONER

SDCL 23-5-1 in material part provides:

"The attorney general shall procure and file for record . . . **information as may be pertinent of all persons who may hereafter be taken into custody for offenses** . . . ." (Emphasis added.)

SDCL 1-27-1 provides:

"In every case where the keeping of a record, or the preservation of document or other instrument is required of an officer or public servant under any statute of this state, such record, document, or other instrument shall be kept available and open to inspection by any person during the business hours of the office or place where the same is kept."

SDCL 1-27-3 provides:

"Section 1-27-1 shall not apply to such records as are specifically enjoined to be held confidential or secret by the laws requiring them to be so kept."

SDCL 23-5-11 provides:

"Section l-27-1 does not apply to confidential criminal justice information."

SFPD Records Control Regulation 1201 in part provides:

". . . Records destruction shall comply with those guidelines set forth in 'Managing Public Records' prescribed by the South Dakota Bureau of Adminisration Records Management Program."

Adopted to the foregoing regulation, SFPD Case Report Retention and Destruction Regulation 213 in part provides:

"CASE REPORT . . . is used to provide background information and a narrative completed by the officer outlining circumstances of the initial contact and disposition of a case. . . . Retain 2 years in office, then transfer to storage for eight years. Destroy after 10 years provided the file has remained inactive without leads, for 1 year prior to disposal."

SFPD Records Security Regulation 1202 in material part provides:

"Federal and state law closely regulates the collection and dissemination of Criminal Records information. **Any criminal record information contained in the department's record system can only be shared with other law enforcement agencies and officers, and others in the criminal justice system, on a strict need and right to know basis. . . .** Only Police Department personnel will use the CRT terminals. **No information available on the CRT's will be given to the general public . . . .**" (Emphasis not added.)

SDCL 16-19-99 in material part provides:

"All proceedings involving allegations of misconduct by . . . an attorney shall be kept confidential until a formal complaint asking for disciplinary action is filed with the Supreme Court by the board or the attorney general . . . ."

SOUTH DAKOTA RULES OF EVIDENCE

SDCL 19-14-2 in material part provides:

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. . . ."

SDCL 19-14-19 in material part provides:

"Cross-examination should be limited to the subject matter of the direct examination . . . ."

SDCL 19-15-l(1) in material part provides:

"If the witness is not testifying as an expert, his testimony in the of opinions or inferences is limited to those opinions or inferences which are . . . rationally based on the perception of the witness . . . ."

SDCL 19-16-4 provides:

"Hearsay is not admissible except as provided by law or by chapters 19-9 to 19-18, inclusive, or by other rules prescribed by the Supreme Court."

SDCL 19-17-5 in material part provides:

"Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to a copy of an official record or report . . . certified as correct by the custodian or other person authorized to make the certification . . . ."

ALLEGATIONS IN RESPONDENTS' STATEMENT OF CASE ARE EITHER MISSTATEMENTS OF FACT OR, WHERE OTHERWISE TRUE AS ALLEGED, ARE IRRELEVANT AND PREJUDICIAL TO THIS COURT'S FAIR ADJUDICATION OF THE MERITS OF ACTION

Contrary to Respondent's allegations at page 2 of their brief, Petitioner was not "[i]n the spring of 1978 . . . arrested for attempted rape" nor was his spuriously alleged "arrest . . . the subject by local news media" other than the media Respondents herein. Neither is the inadmissible fact therein alleged by Respondents that Petitioner had been "stark naked" when he was detained by the police "in a Sioux Falls, S.D., drug store" a material fact herein. This irrelevancy has been herein injected by Respondents for the sole reason of so demonizing Petitioner as to herein irreparably prejudice Petitioner's *personna* in the consciousness of the Court to the end of Petitioner never having his day in court on the merits of his cause of action nothwithstanding the fact that Respondents are herein absolutely liable to Petitioner by the South Dakota common law doctrine of negligence *per se*.

[References in parentheses are pages in state trial court record]

ARGUMENT

I

WITH NO ADMISSIBLE EVIDENCE IN SUPPORT THEREOF AND IN HEREIN CONTINUING LIBEL OF PETITIONER UNDER COLOR OF JUDICIAL PRIVILEGE, RESPONDENTS MANUFACTURE EVIDENCE IN THEIR BRIEF THAT PETITIONER WAS ARRESTED FOR A CRIME WHEN SUCH WAS NOT IN LAW NOR IN FACT THE CASE IN THE ACTION AT BAR

On May 28, 1978, Petitioner was detained by officers of the Sioux Falls Police Department (SFPD) for what was officially classified on the face of the SFPD Case Report (300) as an "incident"; which

detainment was therein by the SFPD investigating officer "cleared" on a ground other than an arrest for a criminal offense.

At page 3 of their opposition brief, Respondents incredibly state that the foregoing official SFPD noncriminal disposition of the May 28, 1978 incident is not "true".

In support of their foregoing transformation of the noncriminal May 28, 1978 incident report into a report of an arrest for a criminal offense, Respondents use false and misleading contents of said confidential SFPD Case Report which Respondents' attorney well knows are herein inadmissible into evidence by prohibition of the following exclusionary rule and rules of evidence:

1.said purported incident report is confidential "investigative information" within the meaning of SDCL 23-5-10(1) and is thereby herein inadmissible into evidence by prohibition of SDCL 1-27-3, SDCL 23-5-11 and SFPD Records Security Regulation 1202;

2. the purported SFPD Case Report containing the false and defamatory matter herein relied on by Respondents is not certified as being a true and correct copy of the original report over the signature of the official custodian of the government record as required by SDCL 19-17-5;

3. purported facts in said purported incident report are not based on personal knowledge of the author thereof and are herein thereby inadmissible into evidence by prohibition of SDCL 19-14-2;

4. said purported incident report contains statements of witnesses made to the investigation police officer who therefrom after the fact wrote up the incident report which are herein inadmissible as hearsay into evidence by prohibition of SDCL 19-16-4; and

5. said purported incident report contains incompetent legal opinions (Petitioner "was lodged under attempted rape

charges" and "was arrested for the above named offense") of police who was not trained in the law and an opinion (Petitioner "had the intent of raping her") of the same police officer as to his alleged motive of Petitioner which was not rationally based on the direct perception of the police officer which are not competent as opinions and thereby not admissible into evidence herein by prohibition of SDCL 19-15-1.

To spuriously buttress their foregoing bad faith argument that selected contents of the SFPD Case Report transformed the noncriminal incident for which Petitioner was detained on May 28, 1978 into a criminal offense for which Petitioner had been arrested, Respondents utilized pretrial deposition testimony of police officers Glenn Rivers and William Dunker which is not herein admissible into evidence by prohibition of the following South Dakota rules of evidence:

1. all of said questions by the attorney for Respondents in his cross-examination of Sgt. Rivers and Lt. Dunker were not in the scope of Petitioner's pretrial direct deposition examination of them as required by SDCL 19-14-19;

2. the purported factual substance of their cross-examination answers is derived solely from the aforesaid confidential SFPD Case Report and the said answers are thereby inadmissible herein by prohibition of SDCL 1-27-3, SDCL 23-5-11 and SFPD Records Security Regulation 1202;

3. said answers are opinions not based on personal knowledge of Sgt. Rivers and Lt. Dunker and are thereby herein inadmissible into evidence by prohibition of SDCL 19-14-2;

4. said answers by Sgt. Rivers and Lt. Dunker are based on hearsay which is inadmissible into evidence herein by prohibition of SDCL 19-16-4; and

> 5. said answers are legal opinions (Petitioner was arrested for attempted rape, Petitioner was lodged for a charge of attempted rape) to which Sgt. Rivers and Lt. Dunker are herein, for lack of legal training, incompetent to testify and an opinion (Petitioner "had the intent of raping her") as to Sgt. Rivers' alleged motive of Petitioner is not rationally based on the direct perception of Sgt. Rivers and is thereby not competent as an opinion to be herein admitted into evidence by prohibition of SDCL 19-15-1;

which evidentiary objections to the admissibility of the cross-examination testimony of Sgt. Rivers and Lt. Dunker were of record (576-7) made by the Petitioner before the court and were herein of record undisputed by Respondent.

The trial court never of record ruled on Petitioner's foregoing clearly meritorious objections to the admissibility of SFPD Case Report 44 (300) and cross-examination testimony of Sgt. Rivers and Lt. Dunker in advance of the trial court's *ex parte* order dismissing Petitioner's action herein on its sole specific finding of fact that Petitioner failed "to establish by clear and convincing evidence that (Respondents) acted with actual malice".

Ignoring the foregoing sole *ratio decidendi* of the trial court's decision to dismiss Petitioner's action against Respondents for their slander that Petitioner had been arrested for the felony at bar, and what with the herein incontrovertible fact that the May 28, 1978 detainment of Petitioner was by the SFPD justified on a ground other than an arrest for a criminal offense combined with the foregoing detailed meritorious evidentiary objections by Petitioner to the admissibility of the confidential contents of the noncriminal SFPD "Incident", *vis-à-vis* criminal "Offense", Case Report (300) and the pretrial deposition testimony of Sgt. Rivers and Lt. Dunker on cross-examination by the media Respondents' attorney; media Respondents, herein unconscionably utilizing clearly inadmissible false confidential contents of said noncriminal incident report and, solely derived therefrom, deposition testimony of Sgt. Rivers and Lt.Dunker with no foundation in admissible fact, herein in bad faith attempt to mount and sustain a spurious defense of truth for their patently false and

defamatory 1990 broadcast that Petitioner had in 1978 been arrested for a felony.

As Respondents' foregoing spurious attempt to establish truth as a defense for their broadcast that Petitioner had been arrested for the felony at issue failed in the trial court for want of it ever making a finding of fact this broadcast was true, so should said spurious defense of truth be herein rejected by this Court.

Legal logic dictates that where, as is herein without dispute between the parties, Petitioner had never been charged with a crime as a result of the May 28, 1978 incident before or after his detainment by the police, he could not by law nor in fact theretofore or thereafter have been arrested for a crime for which he had not theretofore or thereafter been charged.

Rather than own up to the simple truth that Petitioner had not in law nor, *a fortiori,* in fact been arrested for a felony as without question herein establishes by operation of the noncriminal disposition of the May 28, 1978 incident by the SFPD in its Case Report (Appendix C to Petition), Respondent would have this Court abandon the foregoing rules of evidence so as to herein find that detainment had not been "cleared" on a ground other than an arrest for a crime and therewith transform the incident report into a report of an arrest for a criminal offense.

On the admissible evidence (137, 140, 338, 772, 725) herein, Petitioner was not arrested on May 28, 1978 for the crime broadcast in 1978.

However driven Respondents are to keep this case focused on their legalistic bad faith contention that, based solely on the herein totally inadmissible collective *ex post facto* consiousness of Sgt. Rivers and Lt. Dunker, Petitioner had been arrested for a crime which said police officers had never witnessed; Respondents do not address the balance of Respondents' slanders that Petitioner had been charged with a felony, in the nude greeted parishioners at a church, taken to the state mental hospital on an emergency mental commitment and was by *innuendo* a pedophile.

II

SOUTH DAKOTA SUPREME COURT DID NOT DECLARE THAT THE RESPONDENTS' BROADCASTS WERE TRUE

Making no specific findings of fact that any of Respondent Armstrong's slanders that Petitioner had been arrested and charged for a felony, nude at a church and committed to the state mental hospital and of Respondent Hemmingsen's slanders that Petitioner had been allegedly arrested for a felony, nude at a church and was by innuendo a pedophile were "true" as in egregious error argued by Respondents at page 7 of their opposition brief, the South Dakota Supreme Court, at page 11a of its opinion attached as Appendix B to the petition for writ of certiorari herein, upheld the state trial court's dismissal of Petitioner's slander action with its ruling that:

> "[9]Hopewell needed to produce evidence that would support a reasonable jury finding of actual malice by clear and convincing evidence. *Anderson v. Liberty v. Liberty Lobby, Inc.*, 477 U.S. 242 . . . (1986); *Janklow v. Viking Press*, 459 N.W.2d 415, 419 (S.D. 1990)"

based on its finding that:

> "Summary judgment was only granted [by the trial court] when Hopewell made no showing of actual malice[9] to generate a genuine issue of material fact to support a trial on his libel claims."

Flying into the face of the foregoing *ratio decidendi* of the South Dakota Supreme Court's decision, Respondents, at page 7 of their brief, disingenuously ground their erroneous assertion that:

> "[T]he South Dakota Supreme Court declared that what Respondents broadcast was true"

on *obiter dictum* (page 6a of Appendix B) in the South Dakota Supreme Court's opinion that:

"Jessica Armstrong and Steve Hemmingsen broadcast some nasty things about Hopewell, which were true[2]";

which footnote 2 provides "*See*, footnote 8, *infra*" and which footnote 8 at page 10a of aforesaid Appendix thereafter provides:

"In fact the broadcasts were substantially true. The evidence before Judge Konenkamp established that if a few details were removed or corrected, the broadcast was essentially correct. Hopewell had already admitted the most damning allegation in the KELO story in a statement in the Sioux Falls Argus Leader, the largest circulating newspaper in South Dakota, on October 23, 1990, just three days before the broadcast:

> 'It's true that I was found nude at the Alick Drug. It should be noted, however, that it occurred as a result of an hallucinogenic experience induced by my having been surreptitiously drugged with what I'm told is called PCP by a sesecret agent of a political adversary who was noted for his dirty tricks and unethical behavior, and is now very probably allied with Gene Paul Kean and who may well have adadvanced this information to you for purposes of my campaign embarrassment.'

Matter of Discipline of Hopewell, 507 N.W.2d at 913."

Within the context of the above quoted *dictum* of the South Dakota Supreme Court, the only "nasty things . . . which were true" in media Respondents' broadcasts were, as noted by the South Dakota Supreme Court at pages 2a-3a of its opinion in aforesaid Appendix, broadcasts (51,57) by Respondents Armstrong and Hemmingsen that:

> "[Petitioner] walked naked into [a] Sioux Falls drug store 12 years ago."

As the foregoing quoted "nasty things about Hopewell . . . which were true" in the broadcasts by media Respondents are not the specific broadcasts, enumerated in pages 9 and 11 of Petitioner's petition for certiorari, herein complained of and thereby not "at issue"

in Petitioner's slander action in the lower court, Respondents' argument that:

> "[T]he South Dakota Supreme Court declared that what Respondents broadcast was true"

has no basis in fact in the record made before the state trial court and on appeal reviewed by the state appellate court in Petitioner's action for slander against media Respondents and their yet to be by name identified anonymous government informant joint tortfeasors.

Where, as in the action at bar, the defense of truth of the herein complained of slanderous broadcasts by the media Respondents herein fails for want of any admissible evidence in support thereof, Section 5 of Article VI of the South Dakota Constitution, *Cox Broadcasting Corp. v.Cohn*, 420 U.S. 469, 490-91 (1975); *Shuster v. U.S. News Report & World Report, Inc.*, 602 F.2d 850, 853 (CA8 1979); *Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (CA4 1976); and *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 864-65 (CA5 1970) are not applicable herein as otherwise herein in error relied on by Respondents at pages 7-8 of their opposition brief in their herein continuing spurious advance of truth as a defense herein.

III

IN REFUSING TO HOLD HEARINGS ON 6 MOTIONS, AND RULE ON 38 EVIDENTIARY OBJECTIONS, BY PETITIONER AND *SUA SPONTE* GRANTING *EX PARTE* ORDERS FOR RESPONDENTS, TRIAL COURT HAD NOT "BENT OVER BACKWARDS TO ENSURE THAT [PETITIONER] WAS GIVEN EVERY OPPORTUNITY TO BE HEARD" AS IN ERROR BY THE SUPREME COURT

Contrary to Respondent's statement at page 3 of their brief that:

> "Petitioner's version of the procedural history of his lawsuit is . . . so divorced from the truth as to appear to be the product of delusion";

it must herein stand as absolute truth that, to be of record in the trial court proceedings noted at pages 12-19 and 28-31 of the petition herein, the trial court:

1. did not hold hearings as duly scheduled on six motions by Petitioner;

2. did not make of record rulings on thirty eight of record evidentiary objections by Petitioner to inadmissible confidential records and pretrial deposition testimony adduced into the trial court record by Respondents without offers of proof thereof;

3. without timely notice of hearing as required by SDCL 15-6-6(a)(b)(c), granted Repondent's petition for release of confidential county mental illness hearing by the county clerk of courts to Respondents;

4. without a precedent motion and notice of hearing thereon by Respondents as required by SDCL 15-6-7(b) and 15-6- 6(d), *sua sponte* ordered, in violation of SDCL 1-27-3, SDCL 23-5-11 and SFPD Records Security Regulation 1202, the Sioux Falls Police Department to turn all of its records, including the confidential SFPD Case Report (300), about Petitioner over to the court for its *in camera* review and subsequent release to Respondent; and

5. without hearing thereon, made *sua sponte* finding of fact "the record fails to establish by clear and convincing evidence that [Respondents] acted with actual malice" and therewith dismissed Petitioner's complaint, which had not been answered of record by Respondents, in its unattested *ex parte* order granting Respondents' motion for summary judgment against Petitioner;

all of which multiple judicial abuses of power combine to 25 procedural errors and omissions, refusal to rule on 38 evidentiary objections and refusal to make 7 findings of material fact for a total

of 70 reversible errors which compound to such massive denial of Plaintiff's right to procedural due process of law as to conclusively establish that Petitioner's due process claims herein are not the "product of delusion" as above asserted by Respondents in libel of Petitioner nor "ludicrous" as Respondents assert at page 7 of their brief.

IV

IN VIOLATION OF STATE CONSTITUTION, LOWER COURTS ABROGATED RESPONDENT ARMSTRONG'S STATUTORY DUTY BY REQUIREMENT OF SDCL 15-6-26(b)(1) TO DISCLOSE NAMES OF THE ANONYMOUS JOINT TORTFEASOR SOURCES OF HER FALSE AND DEFAMATORY BROADCASTS ABOUT PETITIONER

Where Pétitioner does not take issue with Respondents' contention at page 5 of their brief that "privilege . . . shall be determined in accordance with State law", it should be noted at page 8A of Appendix B that after posing the question to be "whether the trial court should have compelled Armstrong to divulge the sources of the information contained in the broadcasts", the South Dakota Supreme Court concedes that "South Dakota does not have a shield law" for journalists such as Respondent Armstrong.

Absent such a statutory "shield law" in South Dakota, what then is the "State law" on the question whether Respondent Armstrong has a privilege to withhold the identity of her joint tortfeasor Respondents A, B, D and E in a civil action where journalist Armstrong is a named defendant for her invasion of Petitioner's statutory privacy in slander and defamation of Petitioner?

Absent a statutory "shield law" for journalists in South Dakota, South Dakota "State law" is comprised of SDCL 19-13-1(2)(4) and SDCL 15-6-26(b)(1), the latter of which state statutes in material part provides:

> ". . . Parties may obtain discovery regarding any matter, not privileged, . . . including the . . . identity and location of per-

sons having knowledge of any discoverable matter."

At page 5 of their brief, Respondents in error cite Rule 501 of the Federal Rules of Evidence, *Longshoremen's Association v. Davis*, 476 U.S. 380, 387 (1986) and *Agins v. City of Tiburon*, 447 U.S. 252, 259 (1981) as combined authority for their specious argument that:

> ". . . the South Dakota Supreme Court's recognition of a qualified reporter's privilege is not subject to review by a writ of certiorari";

which Federal Rule of Evidence should not be herein considered by this Court in that this is a petition for review of a state, not a federal, court decision, and neither of which foregoing cited cases are herein applicable as they do not even remotely address the question of Respondent Armstrong's privilege as a reporter to refuse to disclose the names of the anonymous joint tortfeasor sources (Respondents John Doe A, B, D and E) of her false and defamatory broadcasts about Petitioner.

As the South Dakota statutory counterpart to Federal Rule of Evidence 501 on which Respondents in error rely, SDCL 19-13-1 in material part provides:

> "Except as otherwise provided by Constitution or statute or by chapters 19-9 to 19-18, inclusive, or by other rules promulgated by the Supreme Court of this state, no person has a privilege to: . . . (2) [r]efuse to disclose any matter; . . . (4) [p]revent another from being a witness . . .";

and given the herein uncontrovertable fact that, in advance of the lower state court decisions conferring a journalist privilege on Respondent Armstrong not to disclose the names of Respondents John Doe A, B, D and E, there was no South Dakota common law precedent nor any provision of South Dakota "Constitution, . . . statute or by chapters 19-9 to 9-18, . . . or by other rules promulgated by the Supreme Court of" South Dakota that expressly afforded a

journalist, such as Respondent Armstrong, a privilege not to, as otherwise to the contrary required by combined operation of SDCL 15-6-26(b)(l) and 19-13-l(2)(4) as above quoted, disclose the names of the foregoing named anonymous joint tortfeasor sources of her false and defamatory broadcasts; the foregoing cited state statutes are the "State law" which by judicial *fiat* the lower courts have herein abrogated in violation of Section 21 of Article VI of the South Dakota Constitution which in material part provides:

> "No power of suspending laws shall be exercised, unless by the Legislature or its authority";

which violations of SDCL 15-6-26(b)(l), SDCL 19-13-l(2)(4) and the foregoing constitutional provision by the lower state courts constitute denial of Petitioner's Fourteenth Amendment rights to due process and equal protection of the aforesaid state statutes and constitutional provision.

V

STATE SUPREME COURT'S REFUSAL TO ADJUDICATE TEN OF TWELVE JUSTICIABLE ISSUES IN PETITIONER'S APPEAL CONSTITUTES DENIAL OF PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF STATUTORY RIGHT TO APPEAL TOTALITY OF TRIAL COURT'S JUDGMENT TO APPELLATE COURT

At page 7A of the lower appellate court's opinion (Appendix B), the South Dakota Supreme Court finds and holds that Petitioner:

> ". . . listed twelve [issues] in his *pro se* brief. This appeal boils down to two issues."

SDCL 15-26A-3(1) provides that "[a]ppeals to the Supreme Court from the Circuit Court may be taken as provided in this title from . . . a judgment . . .".

At page 5 of their brief, Respondents trivialize the state supreme court's "boil down" of Petitioner's twelve justiciable issues to two issues for the appellate review to be of no constitutional consequence herein notwithstanding the fact that, in so refusing to review and adjudicate ten justicable issues, such a "boil down" constitutes deprivation of Petitioner's foregoing quoted statutory right to appeal the totality of the trial court's judgment in violation of Petitioner's right to procedural due process herein guaranteed by the Fourteenth Amendment.

VI

IN THAT SECTION 20 OF ARTICLE VI OF STATE CONSTITUTION IS BUT A RESTATEMENT OF 14TH AMENDMENT DUE PROCESS CLAUSE, STATE SUREME COURT HOLDING THAT TRIAL COURT WAS "OPEN TO [PETITIONER]" IS NOT CREATIVE OF "INDEPENDENT STATE GROUND" WHICH IS HEREIN IMMUNIZED FROM REVIEW BY THIS COURT

In providing:

> "All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay";

Section 20 of Article VI of the South Dakota Constitution is solely derived from the due process clause of the Fourteenth Amendment and is but a restatement of said due process clause with rhetorical embellishment.

At page l0A of Appendix B, under its opinion heading "DUE PROCESS", the South Dakota Supreme Court applies and construes the foregoing quoted state constitutional provision as follows to the action at bar:

> "The second issue is whether Hopewell was afforded due

process.

> "Hopewell claims that the trial court denied him due process and an open forum. . . . The court was open to Hopewell and his suit";

which holding was dispositive of the question whether Petitioner was denied his Fourteenth Amendment right to due process of law concurrently with the state supreme court's holding that the trial "court was open to [Petitioner] and his suit."

On the foregoing analysis, the "courts shall be open" clause of the state constitution and the "due process" clause of the federal constitution are concurrently self-executing rather than mutually exclusive in their operation as in effect in error argued by Respondents at page 6 of their brief.

In that the "courts shall be open" clause of Section 20 of Article VI of the South Dakota Constitution is herein by guidelines of *Michigan v. Long, id.* at 1040-41, 1044 (1983), so "interwoven with" the "due course of law" clause of said Section 20 which in turn is so "interwoven with [and derivative from] the federal law" of due process, the lower appellate court opinion does not therein contain "a plain statement that the decision . . . rested on an adequate . . . state ground" "independent" of the federal due process issues advanced by the Petitioner to the state supreme court and, as a consequence thereof, "the adequacy and independence of any possible state ground [to the exclusion of federal due process questions herein] is not clear from the face of the opinion" (Appendix B - p. 10A) of the state supreme court; *Michigan v. Long*, contrary to Respondents' misapplication thereof, herein stands as authority that this Court not be precluded from herein assuming jurisdiction of the federal due process questions raised by Petitioner in the lower state courts.

As the *ratio decidendi* of *Payton v. New York*, 445 U.S. 573, 574 (1980) is that

> ". . . New York statutes that authorize police officers to

> enter a private residence without a warrant . . . to make a routine felony arrest"

are unconstitutional in their violation of the Fourth Amendment; the *Payton* decision is not, contrary to Respondents' argument at page 6 of their brief, controlling case authority herein for the therein stated *obiter dictum*:

> "[B]y invoking a state constitutional provision, a state court immunizes its decision from review by this Court." *Id.* at 600.

In so advancing the foregoing *dictum* as an unqualified immutable principle of this Court's judicial review of a state court decision based on **any** "state constitutional provision"; Respondents abrogate the foregoing quoted tests of *Michigan v. Long*, which is the controlling case authority herein on the question whether the foregoing quoted decision of the state state supreme court that the state trial court did not violate the "courts shall be open" clause of Section 20 of Article VI of the South Dakota Constitution is immune from review by this Court.

VII

FEDERAL QUESTIONS I-III AND V-X WERE RAISED BY PETITIONER IN LOWER COURTS AND QUESTION IV IS FAIRLY INCLUDED IN QUESTIONS III AND V THROUGH VIII AND HEREIN REVIEWABLE BY OPERATION OF RULE 14.1(A)

At page 6 of their brief, in reference to Questions I to X presented in the Petition herein, Respondents in error state "only I, IX and X were raised before the South Dakota Supreme Court." To be noted in the compendium of federal questions raised in the lower state courts attached hereto as Appendix D, Questions II, III, V, VI, VII and VIII were with clear specificity raised by Petitioner before said state courts.

Regarding Question IV, Petitioner did not in the lower courts raise the failure of the Sioux Falls Police Department to destroy its case report on the May 28, 1978 within 10 years thereafter as required by SFPD Case Report Destruction Regulation 213 because the trial court had on October 29, 1993 made and entered an order (351) granting the City of Sioux Falls' motion to quash Petitioner's subpoena *duces tecum* that the SFPD produce for Petitioner's inspection "the Policy and Procedures Manual for the Sioux Falls Police Department relating to release of Police Department reports".

Given their complicity with Respondents John Doe A, B and D, who are *prima facie* officials of the Sioux Falls Police Department, fair play and justice requires that the media Respondents not be herein allowed to successfully challenge this Court's review of the question whether the SFPD's failure to destroy the SFPD Case Report (300) at issue within 10 years as required by SFPD Regulation 213 violated Petitioner's Fourteenth Amendment right to due process and equal protecion of Regulation 213 and, for want of SFPD destruction of its case report of the May 28, 1978 incident, Fourth Amendment right "to be let alone" by government.

Another factor that weighs in favor of the Court's review of Question IV is that the substance thereof is "fairly included" in the substance of Questions III, V, VI, VII and VIII and thereby reviewable by the Court by operation of Rule 14.1(a).

VIII

UNTIMELY RECEIPT OF CONFORMED PETITION BY CLERK DOES NOT BAR REVIEW THEREOF BY COURT

Contrary to Respondents' argument at page 4 of their brief, where by precedent of *Durham v. U.S.*, 401 U.S. 481 (1971) , an untimely filing of a petition for *certiorari* presents "no jurisdictional question", neither should the Clerk's untimely receipt of the May 26, 1996 conformed Petition present any jurisdictional question nor herein "bar [this Court's] exercise of discretion to consider this case" by authority of *Taglianetti v. U.S.*, 394 U.S. 316, n. 1 (1960).

CONCLUSION

It being herein undisputed by the heretofore identified media Respondents that they combined with the yet to be indentified government Respondents John Doe A, B, D and E to violate SDCL 1-23-3, 23-5-11, 16-19-99 and SFPD Regulations 213 and 1202, Respondents are herein absolutely liable for damages to Petitioner by the South Dakota common law doctrine of negligence *per se*.

Given the opportunity by leave of the Court to hereafter reinstitute the action at bar in the Second Judicial Circuit Court of South Dakota, Petitioner shall, through of record offers of documents and testimony in proof of material facts, adduce such evidence into the record as will without justiciable question warrant the trial court's grant of Petitioner's for partial summary judgment against all those Respondents who have herein violated the foregoing cited state statutes and city regulations on the "issue of liability" by provision of Rule 56(c).

With the lower state courts' unconscionable disregard of the South Dakota doctrine of negligence *per se* and total abrogation of the South Dakota rules of civil procedure and evidence, there can be no question there has hereinbefore been such a collapse of the rule of law as to warrant the Court's finding that Petitioner's absolute liability action at bar against Respondents has, in the herein prophetic *caveat* of *Celotex v. Cartett*, 477 U.S. 317, 326 (1986), been "railroaded" in unjust nullification thereof by the lower courts' condonation of Respondents' motion for summary judgment; which improper and premature motion is totally devoid of any merits on the facts and law herein.

On the merits of this reply to Respondents' opposition brief and the Petition herein previously filed, Petitioner prays that the aforesaid Petition for Writ of Certiorari be granted by the Court.

To the merciful end of Petitioner not being further defamed by Respondents' herein continuing libels, should this Petition not be granted, Petitioner prays that the Court not be therewith precluded

granted, Petitioner prays that the Court not be therewith precluded from making and entering an order to the Clerks of the Second Judicial Circuit Court of South Dakota, South Dakota Supreme Court and this Court purging the record of all references to the May 28, 1978 conduct of Petitioner and to the October 26, 1990 broadcasts about Petitioner.

Respectfully submitted this 22nd day of September, 1996.

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APPENDIX D

FEDERAL QUESTIONS IN PETITION FOR WRIT OF CERTIORARI WHICH RESPONDENTS IN THEIR OPPOSITION BRIEF DISPUTE THAT PETITIONER RAISED IN LOWER STATE COURT PROCEEDINGS

In the last parargraph of page 6 of their opposition brief, Respondents state:

> "This Court will not address claims not raised below. . . . As a result, this Court has no jurisdiction to address Issues II, III, IV, VI, VII and VIII."

At pages i-iii of the Petition for Certiorari herein, the foregoing referred to Questions II, III, IV, V, VI, VII and VIII therein respectively provide as follows:

II

WITHOUT HAVING THERETOFORE CONDUCTED AN EVIDENTIARY HEARING ON THE MATERIAL FACTS HEREIN, DOES TRIAL COURT'S *EX PARTE* FINDING THAT "THE RECORD FAILS TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT [RESPONDENTS] ACTED WITH ACTUAL MALICE" DEPRIVE PETITIONER OF HIS DUE PROCESS RIGHT TO A HEARING ON COURT FINDING?

III

WHERE PRECLUDED BY STATE STATUTE, DID CITY POLICE DEPARTMENT'S COLLECTION AND DISSEMINATION OF DEFAMATORY INFORMATION ABOUT PETITIONER DENY PETITIONER EQUAL PROTECTION OF PRECLUSIONARY STATUTE IN INTRUSION INTO PETITIONER'S LIFE AS RESPECTIVELY PROHIBITED BY FOURTEENTH AND FOURTH AMENDMENTS?

IV

IN FAILING TO DESTROY POLICE RECORD ON MAY 28, 1978 INCIDENT WITHIN TEN YEARS AS REQUIRED BY SFPD REGULATION 213 BY OPERATION OF SFPD 1201, DID CITY POLICE DEPARTMENT RETENTION OF SAID RECORD MORE THAN TEN YEARS DEDENY PETITIONER EQUAL PROTECTION OF AFORESAID CITY REGULATIONS IN CONTINUED INTRUSION INTO PETITIONER'S LIFE AS RESPECTIVELY PROHIBITED BY THE FOURTEENTH AND FOURTH AMENDMENTS?

V

DID RELEASE OF CONFIDENTIAL RECORDS IN VIOATION OF CITY REGULATION AND STATE STATUTES DEPRIVE PETITIONER OF EQUAL PROTECTION OF SAID REGULATION AND STATUTES GUARANTEED BY THE FOURTEENTH AMENDMENT?

VI

DID RELEASE OF CONFIDENTIAL RECORDS INTRUDE ON PETITIONER'S FOURTH AMENDMENT RIGHT TO "BE LET ALONE"?

VII

DID RELEASE OF CONFIDENTIAL RECORDS WITHOUT HEARING IN ADVANCE OF PUBLICATION THEREOF DEPRIVE PETITIONER OF PROCEDURAL DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT?

VIII

DID RELEASE OF CONFIDENTIAL RECORDS DEPRIVE PETITIONER OF HIS FIRST AMENDMENT RIGHT TO RUN FOR OFFICE WITHOUT TORTIOUS INTERFERENCE BY HIS ELECTION OPPONENTS?

Referring to Question II presented at page i of the Petition herein, in Petitioner's motion (554) to the trial court to vacate its summary judgment, Petitioner twice raise the federal question is to whether, in the trial court's *ex parte* order granting Respondent's motion for summary judgment, the trial court's finding (416) therein without an evidentiary hearing that Respondents had not acted with malice deprived Petitioner of:

1. ". . . due process of State rules of civil procedure and evidence guaranteed by . . . the Fourteenth Amendment to the United States Constition" (555); and

2. ". . . for want of an evidentiary hearing of record on the [Respondent's motion for summary judgment], . . . due process (hearing on motion) of law (SDCL 15-6-77(a) . . .) guaranteed [Petitioner] by . . . the Fourteenth Amendment to the United States Constition by precedent of *Fuentes v. Shevin*, "(407 U.S. 67, 80 (l972)" (580);

which aforesaid motion by Petitioner raising the foregoing federal question whether Petitioner was entitled to a hearing on the trial court's finding that Respondents had not acted with malice was, without hearing thereon as previously timely scheduled and noticed (580-81) by Petitioner to be held on March 24, 1994, *sua sponte* denied by March 25, 1994 order (665) of the trial court. At page 30 of Petitioner's October 30, 1994 state appellant's brief, Petitioner raised the foregoing federal question of Petitioner's Fourteenth Amendment right to "procedural due process"; which the state

supreme court, in egregioius disregard of the fact that there was no evidentiary hearing on the trial court's finding that Respondents had not acted with malice, rejected with its clearly erroneous finding (Appendix B - p. 11A) that Petitioner had been "given every opportunity to be heard" by the trial court on the foregoing question of "malice". In that there was in fact no hearing on the trial court's finding that Respondents had not acted with malice, the state supreme court's finding that Petitioner had been "given every opportunity to be heard" conflicts with *Fuentes v. Shevin, supra,* and therewith presents such an "important federal question" as to herein, pursuant to Rule 10(c), constitute a "compelling reason" for the Court to grant Petitioner's Petition for Certiorari.

Referring to Questions III and V at pages i-ii of the Petition herein, pages 35-36 and 89-90 of Petitioner's December 9, 1994 appellant's brief to the state supreme court combine to provide:

"SDCL 23-5-1 in material part provides:

> 'The attorney general shall procure and file for records . . . information as may be pertinent of all persons who may hereafter be taken into custody for offenses other than those arising solely out of the violation of the fish, game, conservation, or traffic laws of this state with the exception of those persons charged with driving a motor vehicle while under the influence of alcoholic beverages, and also of all criminals wheresoever the same may be procured . . .';

from which statute the City of Sioux Falls derives its police power to compile a record of criminal offenses for which [Petitioner] may have been arrested, charged and convicted The City of Sioux Falls did not, however, therefrom derive a police power to keep and disseminate the false and defamatory contents of the noncriminal May 28, 1978 incident report (300) as [Respondent] John Doe A did on October 26, 1990 to [Respondents] Armstrong and Hemmingsen for their television broadcasts to the public."

[Pages 37 through 88 of Petitioner's state appellant's brief deleted]

> ". . . [Petitioner] has herein established . . . that [Petitioner] has has separate causes of action against . . . all [Respondents] for . . . their abrogations of [Petitioner's] rights to equal pro tection of law (SDCL 1-27-3, 23-5-1, 23-5-11 . . .) guaranteed [Petitioner] by the . . . Fourteenth Amendment to the United States Constitution and herein actionable by [Petitioner] against [Respondents] pursuant to 42 U.S.C. 1983."

Referring to Questions III and VI presented in the Petition herein, in the below of record cited (556, 567-8, 571, 574, 578) proceedings before the trial court, Petitioner raised the federal question whether:

> 1. SFPD keeping of a record about Petitioner's conduct on May 28, 1978 which, due to the official noncriminal disposition of the incident by the SFPD, the SFPD was not empowered to so keep by preclusion of SDCL 23-5-1;
>
> 2. release, in violation of SDCL 1-27-3, SDCL 23-5-11 and SFPD Records Security Regulation 1202, of information from the aforesaid confidential record, SFPD Case Report - Incident 44 (300) by Respondents John Doe A, B and D, presumably SFPD officials, to media Respondents Armstrong, Hemmingsen and Midcontinent Broadcasting Corporation;
>
> 3. broadcast, in violation of SDCL 1-23-3, SDCL 23-5-11 and SFPD Regulation 1202, of confidential contents of SFPD Case Report 44 by the aforesaid media Respondents to their television public;

4. release, in violation of SDCL 1-27-3, SDCL 23-5-11 and SFPD Regulation 1202, of confidential informationion in said SFPD Case Report, by SFPD Lt. William Dunker to Respondents' attorney for recompilation thereof in the June 25, 1993 affidavit of Lt. Dunker herebelow filed by Respondents;

5. trial court's *sua sponte in camera* inspection, in violation of SDCL 1-27-3, SDCL 23-5-11 and SFPD Regulation 1202, of said SFPD Case Report, and other confidential police records, and release without motion and notice of hearing by Respondents, of said confidential police records to Respondents to the end of their herein manufacturing, with the poisoned fruits of the trial court's *sua sponte* discovery action, false, defamatory and inadmissible evidence that Petitioner had been arrested for a felony broadcast; and

6. Release, in violation of SDCL 1-27-3, SDCL 23-5-11 and SFPD Regulation 1202, of confidential information about Petitioner from SFPD Case Report--Incident 44 (300) to Respondents by Sgt. Glenn Rivers and Lt. William Dunker in their inadmissible answers to cross-examination pretrial deposition questions by the attorney for Respondents which went beyond the scope of their direct examination by Petitioner,

violated Petitioner's right:

1. "'to be let alone'" from intrusions by the private sector and government as guaranteed by...the Fourth Amendment to the United States Constitution by authority of *Truxes v. Kenco Enterprises, Inc.* 80 S. D. 104, 119 N.W.2d 914

(1963) and *Stanley v. Georgia*, 394 U. S. 557, 564 (1969) respectively" (556);

2. "to privacy not invaded herein by foregoing Affidavit [of Lt. William Dunker] as guaranteed in the civil rights *penumbrae* of...the Fourth Amendment to the United States Constitution" (567-8);

3. "not to have his privacy invaded as guaranteed in the civil rights' *penumbra* of ...the Fourth Amendment to the United States Constitution" (571);

4. "not to have his privacy invaded by the foregoing libelous purported incident report guaranteed in the civil rights' *penumbrae* of . . . the Fourth Amendment to the United States Constitution" (574); and

5. "not to have his privacy invaded by the foregoing incompetent, false and defamatory opinions of Sgt. Rivers and Lt. Dunker as guaranteed in the civil rights' *penumbrae* of the Fourth Amendment to the United States Constitution" (578);

which federal question the trial court refused to adjudicate and was preserved on appeal therefrom in Petitioner's assignments of error 7 (567-68), 9 (571), 13 (574) and 14 (578) to the South Dakota Supreme Court and thereafter further advanced and preserved as a federal question in Petitioner's December 9, 1994 amended state appellant's brief as follows:

1. "the release of the aforesaid purported incident report by the trial court to [Respondents] . . . deprived [Petitioner] of his right . . . not to have his privacy invaded by the foregoing libelous purported incident guaranteed in the civil rights' *penumbrae* of . . . the

Fourth Amendment to the United States Constitution" at pages 39-40 thereof;

2. release of false contents of confidential SFPD Case Report (300) into trial court record through Respondents' offer of Lt. William Dunker's Affidavit (167) which falsely charges that Petitioner was arrested for having committed a felony deprived Petitioner of his right "not to have his privacy invaded and *personna* therewith publicly defamed herein by the aforesaid libelous Affidavit as prohibited within and by the civil rights' *penumbrae* of . . . the Fourth Amendment to the United States Constitution" at pages 46-47 thereof;

3. "[t]he trial court's failure to make and enter rulings of record on [Petitioner's] foregoing stated evidentiary objections and motions to strike under color of law deprived [Petitioner] of his right[s] to . . . not have his privacy invaded by foregoing incompetent, false and defamatory opinions of Sgt. Rivers and Lt. Dunker as guaranteed in the civil rights' *penumbrae* of . . . the Fourth Amendment to United States Constitution" at page 52 thereof; and

4."[t]he trial court's failure to rule on [Petitioner's] . . . objections to the admissibility of [Respondents'] clearly inadmissible offers of the aforesaid records, affidavits, cross-examination testimony and exhibits deprived [Petitioner] of his right . . . 'to be let alone' from intrusions by the private sector and government as guaranteed by . . . the Fourth Amendment to the United States Constitution by authority of *Truxes v. Kenco Entrprises, Inc.*, 80 S.D.104, 119 N.W.2d 914, 915 (1963) and *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) respectively" at page 55 thereof.

Referring to Question V as the same relates to SDCL 16-19-99:

> "all [state bar disciplinary board] proceedings involving allegations of misconduct by . . . an attorney shall be kept confidential until a formal complaint asking for disciplinary action is filed with the Supreme Court by the board or the attorney general . . .";

in the Petitioner's motion (554) to the trial court to vacate its summary judgment, Petitioner raised the federal question whether the trial court's ruling (Appendix A - p. 2A) that a:

> ". . . violation of SDCL 16-19-99 does not create a . . cause of action" in that "(t)he public has a compelling interest in the integrity of its judiciary which outweighed [Petitioner's] expectation of privacy at the time he was a judicial candidate"

violated Petitioner's right:

> "'to be let alone' from intrusions by the private sector and government as guaranteed by . . . the Fourth Amendment to the United States Constitution by authority of *Truxes v. Kenco Enterprises, Inc.*, 80 S.D. 104, 119 N.W.2d 914, 915 (1963) and *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) respectively";

which federal question was preserved and argued on appeal to the state supreme court at pages 79-80 of Petitioner's December 9, 1994 state appellant's brief as follows:

> "[t]he trial court's selective abrogation of the protection afforded other lawyers by SDCL 16-19-99 to the exclusion of [Petitioner] for the sole reason he was a candidate for judge constitutes . . . denial of his right to be let alone . . . guaranteed by the Fourth . . . Amendment to the United States Constitution."

Referring to Question VII, the federal question therein was at page 97 of Petitioner's December 9, 1994 state appellant's brief raised as follows:

"'. . . Due process obligates the government to accord an individual the opportunity to disprove potentially damaging allegations before it disseminates information that might be used to his detriment. The proper form for definitively adjudicating an individual's guilt or innocence is a trial that conforms to constitutional strictures; if the government aborts that procedure . . ., the Constitution requires that he be treated as though he engaged in no criminal activity. For the government to disseminate an arrest record pertaining to the allegedly criminal episode, when it knows that employers may infer that the individual was guilty rather than innocent of the crime, effectively permits the government to inflict punishment despite the fact that guilt was not constitutionally established.' *Utz v. Cullinane*, 520 F.2d 467, 480-81 (CA D.C. 1975)."

Referring to Question VIII, the federal question of whether Respondents' tortious interference with his election as a judge deprived Petitioner of his First Amendment right to run for public office without tortious interference by political opponents is, at page 89 of Petitioner's amended state appellant's brief, raised as follows:

"All [Respondents] government and private, having . . denied [Petitioner] his right to pursue election free from tortious interference by [Respondents], said [Respondents] are herein liable to [Petitioner] for their . . . violations of the First Amendment . . . to the United States Constitution . . .".

Regarding Question IV, Petitioner did not in the lower courts raise the failure of the Sioux Falls Police Department to destroy its record on the May 28, 1978 incident as required by SFPD Case Report Retention and Destruction Regulation 213 because Petitioner had not discovered the existence of Regulation 213 until after the October 18, 1995 decision of the South Dakota Supreme Court.